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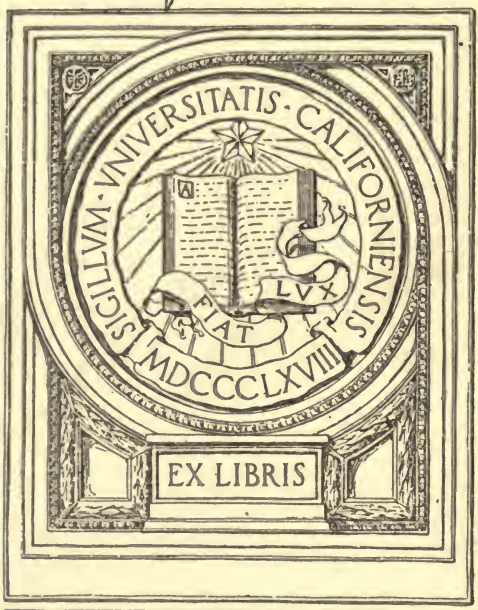

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A MANUAL FOR COURTS-MARTIAL

Revised in the office of the Judge Advocate General of the Army and published by direction of the President

EFFECTIVE FEBRUARY 4, 1921

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"Justice ought to bear rule everywhere, and especially in armies; it is the only means to settle order there, and there it ought to be executed with as much exactness as in the best governed cities of the kingdom, if it be intended that the soldiers should be kept in their duty and obedience."—The Art of War, by Louis de Gaya, in 1678. (Title page, Clode, Administration of Justice under Military and Martial Law, 1892.)

The discipline and reputation of the Army are deeply involved in the manner in which military courts are conducted and justice administered. The duties, therefore, that devolve on officers appointed to sit as members of courts-martial are of the most grave and important character. That these duties may be discharged with justice and propriety it is incumbent on all officers to apply themselves diligently to the acquirement of a competent knowledge of military law, to make themselves perfectly acquainted with all orders and regulations, and with the practice of military courts.—Army Regulations, 1835, Article XXXV, paragraph 1.

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INTRODUCTION.

This book is a revision of the 1917 edition of the Manual for Courts-Martial, which was prepared in the office of the Judge Advocate General and issued by direction of the Secretary of War under date of November 29, 1916, to take effect March 1, 1917, for the purpose of introducing and interpreting to the Military Establishment the Articles of War enacted August 29, 1916. The general plan and scope of that Manual have been approved by the service. They are retained in this edition.

The Articles of War of 1916 were the outgrowth of long experience and careful study; but since their enactment the World War has supervened. It would have been strange if the unusual experiences of such a war, where upward of 200,000 new officers were commissioned in the service, largely with brief training, and nearly 4,000,000 men were suddenly called into the Army, had not developed some defects in the system of military justice. It was to be expected that the conditions of such an unprecedented World War would show many respects in which the existing code might be improved. Nevertheless, while some defects developed, the system as a whole worked well. A mighty army was quickly disciplined; indeed was raised within a few months to such a high pitch of discipline that, tested at the front, not only did it do its duty magnificently, but the relative number of courts-martial was markedly less than in ordinary peace times. In one respect it made an unexampled record—it proved not to be necessary, during the whole war, to carry the death sentence into effect a single time for a purely military offense. The War Department board created in the spring of 1919, under the presidency of Maj. Gen. Kernan, to examine into the administration of military justice during the war and make recommendations for its improve-

ment, reported (Report of Kernan Board, July 17, 1919, p. 13):

"In the opinion of this board, the existing court-martial system is fundamentally sound and well calculated to serve successfully the ends for which it was created. It is an evolution representing constant change and growth. No claim is made that it is a perfect system; rather it is definitely admitted that in the light of experience changes may be made now in the direction of improvement. Under it errors in the proceedings, the findings, and in the measure of punishment occur from time to time. This has always been so and will always be so in some measure. But this is not peculiar to the court-martial; it is true of all agencies created and administered by man. Military justice is carried out at all times under great urgency and stress, where the nice deliberation and finish of the civil procedure is utterly impossible."

Meeting needs as they developed, the War Department, upon the recommendation of the Judge Advocate General, by General Orders, No. 7, January 17, 1918, early in the war established a judicial advisory review in the office of the Judge Advocate General (or in a branch office, under an acting judge advocate general in France) of sentences of general courts-martial involving death, dismissal of an officer, or unsuspended dishonorable discharge of an enlisted man; and at the same time recommended to Congress that appellate power to review sentences of general courts-martial be lodged in the President. In March, 1919, the Judge Advocate General recommended consideration of certain changes in the administration of military law; and, early in April, 1919, submitted to the Secretary of War drafts of general orders and changes in the Manual for Courts-Martial designed to carry into effect the following purposes:

(*a*) To prevent the return to a court-martial of a record of trial for reconsideration of an acquittal.

(*b*) To prevent courts, at proceedings in revision, from increasing in severity sentences previously adjudged by them.

(*c*) To provide for greater care in the preliminary investigation of charges.

(*d*) To encourage the use of the power of commanding officers to administer disciplinary punishment under the one hundred and fourth article of war in preference to resort to courts-martial.

(*e*) To encourage the reference of cases to inferior courts rather than to general courts-martial.

(*f*) To definitely require (what had theretofore been the usual practice) the reference of charges to a staff judge advocate before referring them to a general court-martial for trial.

(*g*) To definitely require the reference of records of trials by general courts-martial to a staff judge advocate for advice, before action thereon by a reviewing authority.

After having been considered by the General Staff, the Chief of Staff, and the Secretary of War, these recommendations were embodied in substance in General Orders, No. 88, War Department, 1919, and "Changes, Manual for Courts Martial," No. 5, July 14, 1919.

All of these purposes were afterwards realized in statutory form in the recent revision of the Articles of War.

REVISION OF THE ARTICLES OF WAR.

During the early part of the year 1919 several proposed revisions of the Articles of War were introduced in both Houses of the Sixty-fifth Congress, third session, and referred to the Military Affairs Committees of the Senate and the House of Representatives, respectively, and during the month of February, 1919, hearings were held by the Senate Committee on Military Affairs upon a bill providing for amendments to the Articles of War, which had been introduced in the Senate by the chairman of that committee. However, no bill was reported to either the Senate or the House of Representatives during that session of the Congress.

Beginning early in the year 1919, careful consideration and study was given to the whole system of court-martial procedure, with a view to its revision and improvement in the light of experiences of the war. This consideration and study was carried on by the War Department through the special War Department board on "Courts-Martial and Their Procedure," composed of Maj. Gen. Francis J. Kernan, U. S. Army, Maj. Gen. John F. O'Ryan, New York National Guard, and Lieut. Col. Hugh W. Ogden, Judge Advocate; by a committee of civilian lawyers appointed by the president of the American Bar Association; and by the Office of the Judge Advocate General, including a special study of the system of military justice in the British, French, and Belgian Armies by an officer detailed for that purpose. Through the courtesy of the various Governments,

statistical and other information relating to the experiences of those armies in administering military justice during the war were thus placed at the disposal of the Judge Advocate General's Office. Particular acknowledgment is due to Sir Felix Cassel, Judge Advocate General of the British Forces; to M. Edouard Ignace, French Undersecretary of State for Military Justice; and to Gen. Baron van Zuylen van Nyevelt, Auditeur General of the Belgian Army.

The first session of the Sixty-sixth Congress began on May 19, 1919, and several proposed revisions of the Articles of War were introduced in both Houses of the Congress at that session, and referred to the Military Affairs Committees of the Senate and House of Representatives, respectively.

A subcommittee of the Senate Committee on Military Affairs held very extensive hearings on one of the bills, and went into the subject very fully. Besides the views of a large number of well-informed witnesses, there were presented, for the consideration of the subcommittee, the results of the studies referred to above.

At the conclusion of those hearings, upon the invitation of the subcommittee of the Senate Committee on Military Affairs, a bill providing for a revision of the Articles of War was prepared and submitted to the subcommittee by the Judge Advocate General.

That revision, with few changes, was adopted by both the subcommittee and the full Committee on Military Affairs of the Senate, and by the Committee on Military Affairs of the House of Representatives; was favorably reported to both Houses of the Congress by those committees; and subsequently was enacted into law as Chapter II of the Army Reorganization Act of June 4, 1920 (41 Stat. 787).

The salient features of the revision are as follows:

1. Enlisted men are placed on a parity with officers in respect of the right to prefer charges against persons in the military service; but all charges must be verified by affidavit. (A. W. 70.)

2. The preliminary investigation of charges is made more strict than in the former code; particularly by the new requirement that, at the preliminary investigation, full opportunity shall be given to the accused to cross-examine witnesses who appear against him, if they are available. (A. W. 70.)

3. The present regulation (C. M. C. M. No. 5, July 14, 1919, par. 76a), which requires that, before directing the trial of a case by general court-martial, the convening authority shall refer the charges presented to his staff judge advocate for consideration and advice, is made mandatory by statute. (A. W. 70, par. 3.)

4. Unnecessary delay on the part of an officer in investigating charges or carrying a case to a final conclusion is made an offense punishable by trial by court-martial. (A. W. 70.)

5. Resort to arrest instead of confinement pending trial in the cases of enlisted men charged with minor offenses is prescribed instead of merely being authorized. This places enlisted men upon the same footing as officers in respect of such offenses. (A. W. 69.)

6. Resort to the power of commanding officers to administer disciplinary punishment under the one hundred and fourth article of war, in preference to resort to courts-martial, is encouraged.

7. The appointment by the convening authority of defense counsel, and one or more assistants, in the same manner in which trial judge advocates and their assistants are appointed, is made mandatory by statute. This places the defense upon the same footing as the prosecution before the court, but does not prevent the man tried from being represented by his own counsel, if he so desires. (A. W. 11, 17.)

8. A "law member" is provided for every general court-martial (A. W. 8, par. 2), with power to rule upon all interlocutory questions, except challenges, subject (except as to rulings on the admissibility of evidence) to an appeal to the court itself. (A. W. 31.)

9. The requirement (which heretofore has existed by regulation) that every record of trial by a general court-martial or military commission shall be referred to a staff judge advocate or to the Judge Advocate General for advice before action thereon by the reviewing or confirming authority, is made mandatory by statute. (A. W. 46.)

10. The words, "in time of peace," are eliminated from the forty-fifth article of war, thus enabling the President to fix the maximum limits of punishment in time of war, as well as in time of peace.

11. The prohibition (which heretofore has existed by regulation), against (*a*), the reconsideration by a court, at proceedings in revision, of an acquittal; a finding of not guilty of any specification; or a finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of war; and (*b*), the adjudication by a court, at proceedings in revision, of a sentence more severe than that previously adjudged by it (unless the sentence previously adjudged was less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction was had), is made mandatory by statute. (A. W. 40.)

12. Provision is made for a new trial in proper cases. (A. W. 40, 47, 49, 50½.)

13. A unanimous vote of the members of the court for death sentences, a vote of three-fourths of the members of the court for sentences involving confinement for life or for more than 10 years, and a vote of two-thirds of the members of the court for all other sentences, is required. (A. W. 43.)

14. Provision is made for a system of appellate review for all general court-martial cases. (A. W. 50½.)

15. Provision is made for greater flexibility in the suspension of sentences. (A. W. 52.)

Other changes in the interest of better administration and greater flexibility which may be mentioned are: An amendment to Articles of War 5 and 6, removing the maximum limit as to the number of members for general and special courts-martial; a change in Article of War 18 which allows each side one peremptory challenge (the law member of the court not being subject to challenge, except for cause); and a change in nomenclature from "judge advocate" to "trial judge advocate," to avoid possible confusion with the staff judge advocate.

With the exception of Articles 2, 23, and 45, which took effect on June 4, 1920, the date on which the act was approved, the revision will go into effect on February 4, 1921. The provisions of the act which have already become effective are as follows:

Article 2, "Persons subject to military law," is amended so as to include members of the Army Nurse Corps, warrant officers, Army field clerks, and field clerks Quartermaster Corps.

Article 23, "Refusal to appear and testify," is amended so as to provide that every person not subject to military law, who before any court-martial, military tribunal, or military board, or in connection with, or in relation to any proceedings or investigation before it, is guilty of any of the acts made punishable as offenses against public justice by any provision of chapter 6 of the act of March 4, 1909 (35 Stat. 1088—commonly known as the Federal Penal Code), or any amendment thereof, shall be punished as provided therein.

Article 45, "Maximum limits" (of punishment), is amended so as to enable the President to prescribe the maximum limits of punishment for trials by courts-martial in time of war, as well as in time of peace.

The present revision of the Manual for Courts-Martial has been prepared primarily to conform the manual to the changes in the Articles of War accomplished by the act of

June 4, 1920, and to embody the results of decisions made by the Office of the Judge Advocate General and the War Department, and such other changes in the regulations for the government of courts-martial and courts of inquiry as have been approved by experience. The aim is to adhere to the principle observed in drafting the present revision of the Articles of War, viz, to make changes dictated by experience, while at the same time holding fast to ancient principles that have proven their value.

The salient changes in the Manual, besides those required to conform to the new Articles of War, are:

(*a*) Paragraph 219, procedure in cases of insanity, has been entirely rewritten.

(*b*) Depositions may be taken on oral, as well as upon written, interrogatories.

(*c*) The chapter on evidence has been rewritten.

(*d*) More definite provisions have been made concerning the curative effect of the thirty-seventh article of war.

(*e*) With a view to reducing the number of court-martial trials, greater stress is laid upon the disciplinary powers of organization commanders; and

(*f*) The appendices have been, in large measure, rewritten, and some new ones added, e. g., Appendix 9, forms for use of the president and the law member of courts-martial.

For the convenience of the service, the numbering of the paragraphs in the Manual of 1917 has been retained and the paragraph numbers placed at the top of the page, for ready reference. Where additional paragraphs have been necessary, they are inserted as extra paragraphs at the proper place (e. g., par. 89a, "Duties of the law member"); or, in some instances where it seemed necessary for clarity, with half numbers (e. g., par. 181½, "Depositions on oral interrogatories—Procedure"). Where paragraphs have been wholly omitted a note to that effect is inserted in small type. (See, e. g., pars. 51 and 54, which are omitted from this revision.)

Changes in the text are indicated by **bold-face type.**

This Manual takes effect February 4, 1921, at the same time as the new Articles of War.

E. H. Crowder,
Judge Advocate General.

January 1, 1921.

Introduction to 1917 Edition.

This Manual introduces and interprets to the Military Establishment the revised Articles of War which become effective March 1, 1917. The revision supersedes the existing articles, sometimes designated the Code of 1874, and repeals all other laws and parts of laws inconsistent therewith. It will facilitate an understanding of the scope and effect of the revision to refer to the history and development of the amended Code of 1874, indicate briefly its most serious defects, and summarize the principal changes introduced by the revision.

HISTORY OF UNITED STATES ARTICLES OF WAR PRIOR TO 1916.

Passing over the earlier enactments of the American Colonies of Articles of War for the government of their respective forces, examples of which are found in the articles adopted by the Provisional Congress of Massachusetts Bay, April 5, 1775 (Am. Archives, 4th series, vol. 1, p. 1350), and the similar articles adopted in May and June of that year by the Provincial Assemblies of Connecticut and Rhode Island and the Congress of New Hampshire (idem, vol. 2, pp. 565, 1153, 1180), we come (*a*) to the first American articles enacted by the Second Continental Congress June 30, 1775, and copied largely from the British Code of 1765 and the Massachusetts Code; (*b*) the Code of 1776, an enlargement and modification of the Code of 1775; and (*c*) the supplemental Code of 1786, regulating the composition of courts-martial and generally the administration of military justice. The articles in force on the adoption of the Constitution of the United States were, by act of the First Congress, made to apply to the then existing Army "so far as the same are applicable" and were continued in force by successive enactments until April 10, 1806, when, by act of Congress of that date, revised

articles, adapted to the changed form of government, were enacted, superseding all other enactments on the same subject. Thus the Code of 1806 was, in effect, a reenactment of the articles in force during and immediately following the period of the Revolutionary War, with only such modifications as were necessary to adapt them to the Constitution of the United States. It comprised 101 articles, with an additional provision relating to spies. During the War of 1812 four of the articles of this code were amended, during the Seminole wars three articles were amended and one new article added, and during the Civil War seventeen articles were amended and eight new articles added. All of these new articles and amendments were gathered into the restatement of the articles which appears in the Revised Statutes of 1874, making a code of 128 articles, with the additional provision relating to spies. Between that year and 1912, when this revision was submitted to Congress, the more important amendments have been the summary court and maximum punishment acts of 1890; the repeal of articles 80 and 110 in 1898; the repeal of article 123 and the amendment of articles 122 and 124 in 1910.

DEFECTS OF ARTICLES PRIOR TO 1916 REVISION.

The more serious defects of the Code of 1874 were those incident to its development by compilation from a now obsolete and replaced foreign code, and by piecemeal amendment made during periods of war and under the stress of war conditions. Eighty-seven articles of the Code of 1806 survived in the amended Code of 1874 without change or with only minor changes of style, and most of the remaining articles of that code without substantial change, with the result that the latter code was unscientific in its arrangement and contained many provisions either wholly obsolete or illy adapted to present service conditions. We may cite as examples illustrating its archaic character the following of its provisions:

The fifty-fourth and fifty-fifth articles prohibited any kind of riot to the disquieting of "citizens of the United States," and article 59 made mandatory the turning over to a civil

magistrate of officers and soldiers accused of an offense against the person or property of any "citizen of the United States," but only "upon application duly made by or in behalf of the party injured," ignoring the more modern doctrine that all persons residing within the United States are entitled to the equal protection of the laws, and that crimes are now punished, not at the instance of an individual but at the instance of the public. Article 126 regulated administration upon the effects of deceased soldiers and devolved the duties incident thereto upon the commanding officer of the troop, battery, or company to which the deceased soldier belonged, but made no provision for similar cases arising among the large class of soldiers who, under the present-day organization, do not belong to troops, batteries, or companies; and similar instances might be multiplied indefinitely.

IMPORTANT CHANGES IN REVISION.

The limits assignable to this introduction permit only the following brief summary of the more important changes introduced by the revised articles:

1. Certain provisions of the Revised Statutes and of the Statutes at Large in the nature of Articles of War, and proper for this reason to be incorporated in a military code, are reenacted in their proper places in the revised articles, and certain other statutes relating to the procedure and practice of the criminal courts of the United States are made the basis of new articles. Examples of legislation incorporated and of new articles suggested are found in revised articles 2, 4, 7, 8, 22, 23, 25, 30, 34, 36, 37, 38, 42, 45, 48, 52, 80, 82, 106, 107, 108, 112, 114, 117, 118, and 119.

2. Articles 1, 10, 11, 36, 37, 52, 53, 76, 87, and 101 of the Code of 1874, either wholly obsolete or embracing only matters properly within the field of Army Regulations, have been dropped.

3. Related provisions have been brought together under five separate headings, and where subheads would serve a useful purpose they have been employed to complete the classification.

4. Provisions relating to the same subject-matter have been consolidated into a single article. Examples of such consolidation may be found in revised article 48, which reenacts with modifications the substantial provisions of four articles of the Code of 1874 and one section of the Revised Statutes, all relating to the confirmation of sentences of courts-martial; and in revised article 61, which reenacts in brief form the material provisions of six of the existing articles of that code relating to unauthorized absences.

5. The authority to convene general courts-martial has been extended to include "the commanding officer of any district or of any force or body of troops" when empowered by the President, thus providing for the case of expeditionary forces not the equivalent of a brigade or higher unit, and other emergent services, and permitting general court-martial jurisdictions to be multiplied as the exigencies of the service may require. (Art. 8.)

6. The jurisdiction of the general court-martial is made concurrent with that of the military commission and other war tribunals in the trial of offenses against the laws of war, and further extended to include the capital offenses of murder and rape when committed in time of peace at places outside the geographical limits of the States of the Union and the District of Columbia. (Arts. 12, 15, and 92.)

7. Authority is granted for the detail of one or more assistant trial judge advocates for each general court-martial, with power to act for the judge advocate, thus largely increasing the capacity of these courts in the disposition of cases. (Arts. 11 and 116.)

8. The provision of the Code of 1874 making regular officers incompetent to sit on courts-martial for the trial of officers and soldiers of other forces is abolished, and all distinctions as to eligibility of officers of the several forces for the performance of court-martial duty is removed. (Art. 4.)

9. A disciplinary court, intermediate between the general and summary court, with adequate power to impose disciplinary punishments but without the power to adjudge dishonorable discharge, is provided for the trial of offenses

where the retention of the offender with his command, to be disciplined rather than his dishonorable discharge, is contemplated, leaving the general court-martial with its extended jurisdiction to be resorted to in grave cases calling for discipline, dishonorable discharge, or prolonged detention in confinement with or without dishonorable discharge, and the summary court for the trial of minor offenses calling for light punishments of confinement and forfeiture.

10. The power to prescribe the procedure, including modes of proof, in cases before courts-martial and other military tribunals has been expressly delegated to the President. (Art. 38.)

11. The statute of limitations of the Code of 1874 (art. 103, as amended by act of Apr. 11, 1890) fixed a uniform period of two years of liability to trial and punishment by general court-martial (not expressly excepting any capital offenses), to be reckoned from the date of the commission of the offense to the date of the issuing of the order for trial, except in case of peace desertion, when the period was required to be reckoned from the date of expiration of enlistment from which the soldier deserted to the date of his arraignment. No period of limitation was presecribed in the case of inferior courts. The new military statute of limitations (art. 39) expressly excepts from its operation the capital offenses of desertion committed in time of war, mutiny, and murder, fixes the period of limitation at three years for the graver common law and statutory felonies denounced and punished in revised articles 93 and 94, conforming to the rule governing Federal civil courts with concurrent jurisdiction of these offenses; and the same period for the offense of desertion in time of peace, a study of statistics having shown that few, if any, deserters of this class are arrested after three years from date of desertion. The two-year period of limitation prescribed by the Code of 1874 is retained in the revised articles for all other offenses than those above named, and the uniform rule is established that all these periods shall be reckoned from the date of commission of the offense to the date of arraignment. The new statute covers trials by any court-martial.

of the former chapter this office has had the assistance of Prof. Wigmore of the Northwestern University, recently commissioned a major and judge advocate in the Officers' Reserve Corps. Prof. Wigmore has given liberally of his time in the preparation of this chapter, has lent the authority of his name to what appears therein, and has performed a work of great value for which appreciation will be general throughout the service. In the chapter on "Punitive articles" an effort has been made to meet what is conceived to be a very urgent need in our service, namely, a statement of the essentials of proof under the more important offenses denounced and punished by the new code, for the guidance of trial judge advocates.

Due to the brief interval between the enactment of the new code and the date when the Manual had to go to the printer in order to be available for troops on foreign station prior to the taking effect of the new code, the preparation of the Manual has necessarily been done with a haste which in a work of such importance it would have been desirable to avoid. It is hoped, however, that no fundamental errors appear therein. In using the Manual it should be borne in mind that over attention to technicalities represents a failure to grasp the spirit of the revision and will lead to requests for interpretation which may usually be avoided by the application of broad principles. It is hoped that by the amplification of chapters of this Manual and the inclusion of new chapters on such subjects as "The law of riot duty," "Martial law," and "Military government," future editions may be made to embrace all that is necessary to the service at large regarding the general subject of military law.

JANUARY 1, 1917.

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ABBREVIATIONS.

A. R.	Army Regulations, 1913.
A. W.	Articles of War, Code of 1920.
Bishop	Bishop's New Criminal Law, 8th edition.
Brit, M. M. M.	British Manual of Military Law [Army], Ed. of 1914.
Clark	Clark's Criminal Law, 2d edition.
Clark and Marshall	The Law of Crimes, 2d edition.
Cyc.	Cyclopedia of Law and Procedure.
Davis	A Treatise on the Military Law of the United States, 2d edition.
Digest	Digest of Opinions of Judge Advocates General of the Army, 1912.
Dudley	Military Law and Procedure of Courts-Martial, 1910.
Greenleaf	Law of Evidence, 16th edition.
Hgs., S. 64	Testimony before subcommittee of Senate Military Affairs Committee (66th Cong.), on hearings on Senate bill 64, "A bill to establish military justice," 1919.
Kernan Board	Report of special War Department board—Maj. Gen. Kernan, Maj. Gen. O'Ryan, and Lieut. Col. Ogden—on "Courts-Martial and their Procedure," July 17, 1919.
R. S.	Revised Statutes of the United States, 1878.
Stat.	United States Statutes at Large.
Thompson	Law of Trials.
Wharton	Criminal Law, 9th edition.
Wigmore	Law of Evidence.
Wigmore, P. C.	Pocket Code of Evidence.
Winthrop	Military Law and Precedents, 2d edition, 1896.

EXECUTIVE ORDER.

By virtue of the powers in me vested as President of the United States of America, and pursuant to Article 38 of Chapter II of an Act of Congress entitled "An Act To amend an Act entitled 'An Act for making further and more effectual provision for the national defense, and for other purposes', approved June 3, 1916, and to establish military justice," approved June 4, 1920 (41 Stat. 759), I prescribe the following rules of procedure, including modes of proof in cases before courts-martial and courts of inquiry in the Army of the United States and direct them to be published for the government of all concerned. These rules shall be known and designated as the Manual for Courts-Martial, and shall be in force and effect on and after February 4, 1921.

WOODROW WILSON.

THE WHITE HOUSE,
17 December, 1920.

CHAPTER I.

MILITARY JURISDICTION.

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SECTION I.

SOURCE AND KINDS OF MILITARY JURISDICTION.

1. SOURCE.—The source of military jurisdiction is the Constitution, the specific provisions relating to it being found in powers granted to Congress, in the authority vested in the President, and in a provision of the fifth amendment.

2. KINDS.—Military jurisdiction is of three kinds, viz:

(*a*) *Military Government* (the law of hostile occupation); that is, military power exercised by a belligerent by virtue of his occupation of an enemy's territory, over such territory and its inhabitants. This belongs to the law of war

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and therefore to the law of nations. When a conquered territory is ceded to the conqueror, military government continues until civil government is established by the new sovereign.

(*b*) *Martial Law at Home* (or, as a domestic fact); by which is meant military power exercised in time of war, insurrection, or rebellion in parts of the country retaining their allegiance, and over persons and things not ordinarily subjected to it.

This is an application of the doctrine of necessity to a condition of war, springing from the right of national self-preservation.

(*c*) *Military Law;* which is the legal system that regulates the government of the military establishment. It is a branch of the municipal law, and in the United States derives its existence from special constitutional grants of power. It is both written and unwritten. The sources of written military law are the Articles of War enacted by Congress June 4, 1920; other statutory enactments relating to the military service; the Army Regulations; this official Manual for Courts-Martial; and general and special orders and decisions promulgated by the War Department and by area, department, post, and other commanders. The unwritten military law is the "custom of war," consisting of customs of the service, both in peace and war.

This Manual deals primarily with military law.

Section II.

EXERCISE OF MILITARY JURISDICTION.

3. Military Tribunals.—Military jurisdiction is exercised through the following military tribunals:

(*a*) *Military Commissions and Provost Courts*, for the trial of offenders against the laws of war, and under martial law, and military government.

(*b*) *Courts-martial—General, Special, and Summary*—for the trial of offenders against military law. (A. W. 3.)

Note. 1.—The general court-martial has concurrent jurisdiction with military commissions and provost courts to try any offender who

by the law of war is subject to trial by military tribunals (A. W. 12, 15).

Over a few offenses general courts-martial and military commissions are expressly, by statute, given concurrent jurisdiction (A. W. 15, 80, 81, 82).

NOTE 2.—It has generally been held that military commissions have no jurisdiction of such purely military offenses specified in the Articles of War as those articles expressly make punishable by sentence of court-martial (except where the military commission is also given express statutory jurisdiction of the offense—A. W. 80, 81, 82); and in repeated instances where military commissions have assumed such jurisdiction their proceedings have been declared invalid in general orders.

But this rule has not always been strictly observed, especially in cases of such offenses as forcing a safeguard (A. W. 78) or intimidation, A. W. 88) of persons bringing supplies (2 Winthrop, 2d Ed., p. 1312, and note 1 [Reprint, 1920, p. 841, note 19]; Davis, 3d Ed., p. 311).

NOTE 3.—For the authority to appoint courts-martial in the National Guard not in the service of the United States, and the jurisdiction and powers of such courts, see sections 102–108, National Defense Act of June 3, 1916, 39 Stat. 208, 209; Appendix 2, infra.

(c) Commanding Officers exercising disciplinary powers under the one hundred and fourth article of war.

(d) *Courts of Inquiry*, for the examination of transactions of or accusations or imputations against officers or soldiers. (A. W. 97.)

NOTE.—A court of inquiry will also be ordered, upon the request of the officer in question, to inquire into the propriety of classifying an officer in class B. (Sec. 24b, Chap. I, act of June 4, 1920; 41 Stat. 773.)

The composition, jurisdiction, procedure, etc., of these tribunals are treated in the succeeding chapters of this Manual.

SECTION III.

PERSONS SUBJECT TO MILITARY LAW.

4. CLASSES ENUMERATED.—The following persons are subject to the Articles of War (A. W. 2):

NOTE 1.—Wherever the following words are used in the Articles of War or this Manual, they are to be construed in the sense indicated below, unless the context shows that a different sense is intended, viz: (*a*) The word "officer" shall be construed to refer to a commis-

sioned officer; (*b*) the word "soldier" shall be construed as including a noncommissioned officer, a private, or any other enlisted man; (*c*) the word "company" shall be understood as including a troop or battery; and (*d*) the word "battalion" shall be understood as including a squadron. (A. W. 1.)

NOTE 2.—Members of the Army Nurse Corps, warrant officers, Army field clerks, and field clerks Quartermaster Corps, are "officers of the Army," but not commissioned officers, and, therefore, are not included within the definition of "officers" contained in the first article of war. The word "officers" is used in this Manual in the same sense as in the first article of war, to designate commissioned officers only. Whenever in this Manual, it is intended to embrace any other persons within the term "officers," it is expressly so stated; and, unless expressly so stated, none of these classes is ever included by the terms "soldiers," or "enlisted men," either in the Articles of War or in this Manual.

(*a*) All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted, or ordered into or to duty or for training in the said service, from the dates they are required by the terms of the call, draft, or order to obey the same.

NOTE.—(*a*) *Regular Army.*—**Composition of the Regular Army: The Regular Army of the United States shall consist of the Infantry, the Cavalry, the Field Artillery, the Coast Artillery Corps, the Air Service, the Corps of Engineers, the Signal Corps, which shall be designated as the combatant arms or the line of the Army; the General Staff Corps; the Adjutant General's Department; the Inspector General's Department; the Judge Advocate General's Department; the Quartermaster Corps; the Finance Department; the Medical Department; the Ordnance Department; the Chemical Warfare Service; the officers of the Bureau of Insular Affairs; the officers and enlisted men under the jurisdiction of the Militia Bureau; the chaplains; the professors and cadets of the United States Military Academy; the present military storekeeper; detached officers; detached enlisted men; unassigned recruits; the Indian Scouts; the officers and enlisted men of the retired list; and such other officers and enlisted men as are now or may hereafter be provided for. Except in time of war or similar emergency when the public safety demands it, the number of enlisted men of the Regular Army shall not exceed 280,000, including the Philippine Scouts. (Sec. 2, act of June 3, 1916, 39 Stat. 166, as amended by sec. 2 of the act of June 4, 1920, 41 Stat. 759.)**

(*b*) *Volunteers.*—The volunteer forces shall be subject to the laws, orders, and regulations governing the Regular Army in so far as such laws, orders, and regulations are applicable to officers or enlisted men whose permanent retention in the military service, either on the active list or on the retired list, is not contemplated by existing law. (Sec. 4, act of Apr. 25, 1914, 38 Stat. 347.)

(*c*) *National Guard.*—The National Guard, when called as such into the service of the United States, shall, from the time they are required by the terms of the call to respond thereto, be subject to the laws and regulations governing the Regular Army, so far as such laws and regulations are applicable to officers and enlisted men whose permanent retention in the military service, either on the active list or on the retired list, is not contemplated by existing law. (Sec. 101, act of June 3, 1916, 39 Stat. 208.)

[NOTE.—The militia when called into the service of the United States is also subject to military law. (35 Stat. 399.)]

(*d*) **National Guard When Drafted into Federal Service.—Members of the National Guard, when drafted into the Federal military service, stand discharged from the militia, and shall be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Army whose permanent retention in the Army is not contemplated by law. (Sec. 111, National Defense Act June 3, 1916, 39 Stat. 211, as amended by sec. 49, Chap. I, act of June 4, 1920, 41 Stat. 784.)**

[NOTE.—Members of the National Guard and of the militia and unorganized reserves, when drafted into the Federal service, are subject to the Articles of War and to Military Law, since such articles and law are "laws and regulations for the government of the Army of the United States" which are "applicable to members of the Army whose permanent retention in the military service is not contemplated by law."]

(*e*) Reserve Officers on Active Duty.—To the extent provided for from time to time by appropriations for this specific purpose, the President may order reserve officers to active duty at any time and for any period; but except in time of a national emergency expressly declared by Congress, no reserve officer shall be employed on active duty for more than 15 days in any calendar year without his own consent. A reserve officer shall not be entitled to pay and allowances except when on active duty. When on active duty he shall receive the same pay and allowances as an officer of the Regular Army of the same grade and length of active service, and mileage from his home to his first station and from his last station to his home, but shall not be entitled to retirement or retired pay. (Sec. 37a, Chap. I, act of June 4, 1920, 41 Stat. 776.)

(*f*) *The Enlisted Reserve Corps.*—The Enlisted Reserve Corps being a part of the Army of the United States (sec. 1, Chap. I, act of June 4, 1920, 41 Stat. 759), its members when placed on active duty

by direction of the President, under section 55b of the National Defense Act as amended by section 35, Chap. I, of the Army Reorganization Act of June 4, 1920 (41 Stat. 780), become subject to the Articles of War, as "persons lawfully * * * ordered into or to duty or for training in" the military service of the United States "from the dates they are required by the terms of the * * * order to obey the same." (Par. (a), A. W. 2.)

(*g*) The Militia—Unorganized Reserves—Drafted Forces.—The militia, or unorganized reserves, whenever called, drafted, enrolled, or mustered into the Federal military service, become subject to the Articles of War, as "persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft, or order to obey the same." (A. W. 2.)

(*b*) Cadets.

(*c*) Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President. (A. W. 2.)

(*d*) Officers and enlisted men of the Medical Department of the Navy, serving with a body of marines detached for service with the Army in accordance with the provisions of section sixteen hundred and twenty-one of the Revised Statutes, shall, while so serving, be subject to the rules and articles of war prescribed for the government of the Army in the same manner as the officers and men of the Marine Corps while so serving. (Act of Aug. 29, 1916, 39 Stat. 573.)

NOTE.—(*a*) Except as provided in (*c*) and (*d*) supra or otherwise specifically provided by law, the Articles of War do not apply to any person under the United States naval jurisdiction. (*b*) An officer or soldier of the Marine Corps detached for service with the Army may be tried by military court-martial for an offense committed against the laws for the government of the naval service prior to his detachment and for an offense committed against the Articles of War he may be tried by a naval court-martial after such detachment ceases. (A. W. 2.)

(*e*) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States though not otherwise subject to the Articles of War.

NOTE.—In addition to the two classes (*a*) "retainers to the camp" and (*b*) "persons serving with the armies of the United States in the field" who were made subject to military jurisdiction by A. W. 60 of the code of 1806 (A. W. 63 of the Revision of 1874), A. W. 2 of the Codes of 1916 and 1920 includes a third class, viz, (*c*) "persons accompanying the armies of the United States."

(*f*) All persons under sentence adjudged by courts-martial.

NOTE.—Inmates of the Soldiers' Home (A. W. 2(f), and R. S. 4824), the National Home for Disabled Volunteer Soldiers (R. S. 4835), all persons admitted to treatment in the general hospital at Fort Bayard, N. Mex., while patients in said hospital (act of June 12, 1906, 34 Stat. 255), and all persons admitted to treatment in the Army and Navy general hospital at Hot Springs, Ark., while patients in said hospital (act of Mar. 3, 1909, 35 Stat. 748), are by the statutes cited made subject to the rules and articles for the government of the Army of the United States; and by A. W. 2(f), inmates of the Soldiers' Home are included within the definition of "persons subject to military law." However, court-martial jurisdiction over them has rarely, if ever, been exercised; and the Judge Advocate General has held such statutes unconstitutional and a dead letter, because those inmates are not a part of the land forces of the United States, being no part of the Army, and not supported by the United States, but are civilians occupying dwellings and sustained by funds held in trust for them (Dig. Ops. J. A. G., 1912, p. 1010, 1-A. Ibid., p. 1012, II).

CHAPTER II.

COURTS-MARTIAL—CLASSIFICATION—COMPOSITION.

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SECTION I.

CLASSIFICATION.

5. KINDS.—Courts-martial shall be of three kinds (A. W. 3), viz:

(*a*) General courts-martial;
(*b*) Special courts-martial; and
(*c*) Summary courts-martial.

NOTE.—The classification of courts-martial adopted by the codes of 1916 and 1920 is identical with that made by the act of March 2, 1913 (37 Stat. 722), which abolished garrison and regimental courts-martial and created special courts-martial.

SECTION II.

COMPOSITION.

6. WHO COMPETENT TO SERVE.—All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial. (A. W. 4.)

EXCEPTIONS.—(*a*) No officer shall be eligible to sit as a member of a general or special court-martial when he is the accuser or a witness for the prosecution (A. W. 8, 9; see chap. 8, sec. 1, par. 129); but when there is only one officer present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him (A. W. 10).

(*b*) Chaplains are not, in practice, detailed as members of courts-martial.

(*c*) Members of the Army Nurse Corps, while they have "relative rank" as officers (sec. 10, Chap. I, act of June 4, 1920; 41 Stat. 767), are not commissioned officers and are not eligible for appointment as members of courts-martial.

Directions to the Appointing Authority.—When appointing courts-martial the appointing authority shall detail as members thereof those officers of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and

judicial temperament; and officers having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of the minority membership thereof. (A. W. 4.)

NOTE 1.—The code of 1920 adopts, in accordance with recommendations made by the Judge Advocate General and by the Kernan Board of the War Department, the principle embodied in the amendment to paragraph 6, M. C. M., of July 14, 1919. (Changes No. 5, M. C. M., July 14, 1919, par. 6, exception (c).)

NOTE 2.—Staff judge advocates are charged with the duty of advising appointing authorities concerning the qualifications of officers of the command for service on courts-martial.

7. NUMBER OF MEMBERS.—Courts-martial shall be composed of the following number of officers (A. W. 5, 6, 7), viz:

(*a*) *General Courts-Martial.*—Any number not less than 5 (A. W. 5).

NOTE 1.—It is not expected that appointing authorities will usually detail on a general court-martial many more members than the minimum required by the statute. An odd number of members, such as 7 or 9, including the law member, will ordinarily be detailed, to allow for a few absences and challenges without breaking the legally required quorum of 5.

While there is no statutory limitation upon the maximum number of members of a general court-martial, appointing authorities will not usually detail more than 9 members; and will not, in any case, unless under very exceptional circumstances, detail more than 13 members.

NOTE 2.—The code of 1920 omits the maximum limitation to 13 members for a general court-martial which had theretofore been required, for the following reasons, as stated by the Judge Advocate General in the "Comparative Print" of the proposed revision submitted by him to the Senate subcommittee:

"(1) The maximum limitation serves no practical purpose; convening authorities are not likely to appoint an excessive number of members on the court. (2) The present maximum limitation in the statute sometimes results in miscarriage of justice, vide, e. g., the 'the 14-member cases,' where this office was compelled to disapprove sentences, manifestly just in themselves, because through one kind of an error or another it appeared that more than 13 members were on the detail for the court. (3) The requirement that the maximum number be always appointed, if practicable, tends not only to unduly burden the command by requiring the detail of a large number of officers for service on the court but also toward a weakening of the personnel of the court by requiring the convening authority to fill up the stipulated number if possible. (4) It weakens the re-

sponsibility of the appointing authority for the qualifications of the personnel of the court. Five, six, or seven members actually sitting out of a personnel of 13 appointed may not be at all the kind of court contemplated by the appointing authority in detailing the court, whereas if the original detail were of but 7 or 9, then the 5, 6, or 7 actually sitting would be more nearly substantially the same court contemplated in the detail. (5) The experience of the British, who have no maximum limitation on their courts, but only a minimum (British Army Act, secs. 47–49), seems to show that the absence of a maximum tends, in practice, to keep down the number detailed to the court to very little above the minimum, and thereby operates to insure that the court sitting at the trial shall be substantially the same court detailed by the appointing authority."

While a number less than 5 can not be organized as a general court-martial or proceed with a trial, they may perform such acts as are preliminary to the organization and action of the court. Less than 5 members may adjourn from day to day, and where 5 are present and one of them is challenged, the remaining 4 may determine upon the sufficiency of the objection. A court reduced to 4 members and thereupon adjourning for an indefinite period does not dissolve itself. The appointing authority may at any time complete it by the addition of a new member or members and order it to reassemble for business. (Digest, p. 158, LXXV, B. 3.)

NOTE 3.—Authority to Add Members.—A general court, though reduced below 5, is not necessarily to be dissolved, nor can it assume to dissolve itself or declare itself dissolved. Such dissolving is a function of the convening commander, who is also empowered, in his discretion, to continue the court by adding a member, or the requisite number of members to bring it up to 5, and when thus renewed, its power as a court is restored, and it may legally proceed with the trial. The adding, however, of new members to courts-martial after a trial has been entered upon has been of rare occurrence in our practice. Such action is not indeed illegal; the added member, provided the evidence taken, or material proceedings had, prior to his appearance, be first read to him from the record, and he be duly sworn (after the accused has been afforded an opportunity to challenge him), may legally act upon the court during the remainder of the trial and take part in the judgment; and the sentence, if any, imposed by the court will be entirely legal and operative. But this action must be in general of doubtful policy, and is not to be resorted to unless the demands of justice and interests of the service clearly require it. Where, for example, by the death, disability, enforced absence, etc., of a member or members, a court is reduced below 5,

in the midst of an important trial, so that, if not renewed, its previous proceedings, however extended, will go for nothing, and the trial will have to be recommenced by a new court, to the delay of justice, inconvenience of the service, detriment of discipline, and perhaps greatly increased public expense,—in such a case the authorized commander will be fully justified in continuing the court by the detail of the requisite number of members. (1 Winthrop, 2d Ed., pp. 100–101.)

If for any reason a general court-martial is reduced below five members it will direct the trial judge advocate to report the facts to the convening authority and wait his orders. The report by the trial judge advocate will, in all cases, be made through the commanding officer of the post, command, or station where the court is sitting, who will indorse thereon the names of a sufficent number of available officers whom he recommends be detailed on the court to enable it to proceed. More than enough to make a quorum should be recommended where practicable in order to provide for future contingencies, and so far as can be foreseen the officers recommended should not be liable to challenge in any case to be tried. If there be no such officer or officers available, the commanding officer will so state. This report will be made by wire whenever deemed advisable in order to prevent unnecessary delay in trying cases. Similar action will be taken before trial by the trial judge advocate and commanding officer whenever the former knows or has good reason to believe that the court will be reduced below a quorum at the time of trial. It is the duty of commanding officers to keep in touch with the business before general courts-martial being held within the limits of their commands and from time to time to take the initiative in making recommendations to the appointing authority as to relieving or adding members, changing the trial judge advocate, assistant trial judge advocate, defense counsel, or assistant defense counsel, or appointing a new court, and as to other matters relating to such courts, so that they may proceed expeditiously and in cooperation with other official business.

(*b*) *Special Courts-martial.*—Any number of officers not less than 3 (A. W. 6).

The remarks under (*a*) ante apply equally to a special court-martial where its membership is reduced below the

minimum required by law, except that in the case of a special court-martial the report by the trial judge advocate will be made to the convening authority, who will, without unnecessary delay, detail a sufficient number of qualified officers to enable it to proceed, or appoint a new court.

(*c*) *Summary Courts-martial.*—A summary court-martial shall consist of 1 officer.

8. "OFFICER" DEFINED.—The word "officer" when used in the Articles of War or this Manual means commissioned officer, unless the context shows that a different sense is intended. (See par. 4, notes 1 and 2, supra.) (A. W. 1.)

9. "IN THE MILITARY SERVICE OF THE UNITED STATES."—(*a*) An officer suspended from rank should not be detailed to sit as a member of a court-martial during the period of suspension.

(b) Retired officer.—"In time of war retired officers may be employed on active duty in the discretion of the President, and when so employed they shall receive the full pay and allowances of their grades," (subpar. 3, sec. 127a, Chap. I, act of June 4, 1920; 41 Stat. 785). "The Secretary of War may assign retired officers of the Army, with their consent, to active duty in recruiting, for service in connection with the organized militia in the several States and Territories upon the request of the governor thereof, as military attaches, upon courts-martials, courts of inquiry and boards, and to staff duties not involving service with troops; and such officers while so assigned shall receive the full pay and allowances of their respective grades." (Act of Apr. 23, 1904, 33 Stat. 264.) "That when by reason of the movement of troops a post is temporarily left without its regular garrison and with no commissioned officer except of the Medical Reserve Corps on duty thereat, the Secretary of War may assign a retired officer of the Army, with his consent, to active duty in charge of such post. The officer so assigned shall perform the duties of commanding officer and also any necessary staff duties at such post, and shall, while in the performance of such duties, receive the full pay and allowances of his grade, subject to the limitations imposed by the act of March 2, 1905, and the act of June 12, 1906, which limitations shall include the grades of brigadier

general, major general, and lieutenant general" (act of Aug. 29, 1916, 39 Stat. 627.)

(*c*) Volunteers become eligible for duty as members of courts-martial from the dates of their muster or acceptance into the military service of the United States (A. W. 2), reserve officers ordered to active duty by the President (sec. 37a, Chap I, act of June 4, 1920; 41 Stat. 776), and all other officers lawfully called, drafted, or ordered into or to duty or for training in the said service from the date they are required by the terms of the call, draft, or order to obey the same (A. W. 2).

10. MARINE OFFICERS.—Marine officers can be detached for duty with the Army only by order of the President (R. S. 1619, 1621), and their eligibility to sit as members of courts-martial to try persons subject to military law continues only during the time they are serving under such order. When any part of the Marine Corps is present with the Army and engaged in a common enterprise with it, without an order of the President detaching it for service with the Army, the case is one of cooperation and not of incorporation, and in such a case no officer of the Marine Corps can exercise command over the Army any more than a naval officer can when some part of the Navy is cooperating with the Army, and the converse is true of Army officers cooperating with the Marine Corps. (28 Op. Atty. Gen., 15.)

11. NO DISTINCTION BETWEEN REGULARS AND OTHER FORCES.—No distinction now exists in the matter of eligibility for court-martial duty among the various classes of officers in the military service of the United States for the trial of any person subject to military law. (Act of Apr. 25, 1914, 38 Stat. 348; A. W. 4.)

12. RANK OF MEMBERS.—(*a*) The order appointing a general or a special court-martial should name the members in order of rank, and they will sit according to rank. (See, however, as to law member, par. 83, infra.)

In no case shall an officer, when it can be avoided, be tried by officers inferior to him in rank. (A. W. 16.) This provision is not prohibitory but directory only upon the conven-

ing authority. Its effect is to leave to the discretion of that officer, as the conclusive authority and judge, the determination of the question of the rank of the members, with only the general instruction that superiors in rank to the accused shall be selected, so far as the exigencies and interests of the service will permit. (Mullan *v.* U. S., 140 U. S., 240; Swaim v. U. S., 165 U. S., 553, 559–560.)

(*b*) Rank among officers of the Regular Army, reserve officers, officers of the National Guard, forces drafted or called into the service of the United States, and volunteers, is determined according to the rules laid down in A. W. 119 and subparagraph 8 of section 127a of Chapter I of the act of June 4, 1920 (41 Stat. 785).

(c) The law member of a general court-martial will ordinarily be of field rank.

If no properly qualified officer of field rank is available from his command, the appointing authority will report the facts to higher authority (by wire, if necessary in order to avoid delay).

The order appointing a general court-martial will specifically designate the law member as such. (See form, Appendix 3.)

13. WHO MAY BE TRIED.—(*a*) For the jurisdiction of general, special, and summary courts-martial as to persons see Chapter IV, Jurisdiction.

(*b*) In addition to the persons subject to military law enumerated in Chapter I, Section III, ante, the general court-martial also has jurisdiction over any other person who by the law of war is subject to trial by military tribunals. (A. W. 12; see Chap. IV, Jurisdiction.)

CHAPTER III.

COURTS-MARTIAL—BY WHOM APPOINTED.

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Section I.

GENERAL COURTS-MARTIAL.

14. Authorities Enumerated.—General courts-martial may be appointed by the following authorities by virtue of the statute (A. W. 8), viz:

(*a*) The President of the United States.
(*b*) The commanding officer of a territorial division.
(*c*) The commanding officer of a territorial department.
(*d*) The Superintendent of the Military Academy.
(*e*) The commanding officer of an army.
(*f*) The commanding officer of an army corps.
(*g*) The commanding officer of a (tactical) division.
(*h*) The commanding officer of a separate brigade.
(*i*) The commanding officer of any district or of any force or body of troops, when empowered by the President to do so.

EXCEPTIONS.—(1) When any of the foregoing commanders is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior competent authority; (2) the superintendent of the Military Academy is not empowered to convene a general court-martial for the trial of an officer. (A. W. 12.)

NOTE 1.—Other commanding officers are from time to time empowered by the President, by General Orders, to convene general courts-martial.

In such cases, for convenience, reference should be made to such general orders, in records of trials by such courts. But such reference is not necessary as to their validity, since judicial notice will be taken of such general orders. (See, infra, par. 289.)

NOTE 2.—For the authority to appoint general courts-martial in the National Guard not in the service of the United States, see section 103, act of June 3, 1916, 39 Stat. 208, Appendix 2, infra.

15. POWER OF THE PRESIDENT TO APPOINT.—In addition to the general statutory authority conferred upon the President by A. W. 8 to appoint general courts-martial he is also empowered to do so by virtue of being Commander in Chief of the Army (Swaim *v.* U. S., 165 U. S., 553) and in the particular case provided for by R. S. 1230.

NOTE.—When any officer, dismissed by order of the President, makes, in writing, an application for trial, setting forth, under oath, that he has been wrongfully dismissed, the President shall, as soon as the necessities of the service may permit, convene a court-martial to try such officer on the charges on which he shall have been dismissed. And if a court-martial is not so convened within six months from the presentation of such application for trial, or if such court, being convened, does not award dismissal or death as the punishment of such

officer, the order of dismissal by the President shall be void. (R. S. 1230.) But a recent decision of the Court of Claims holds Section 1230, R. S., inoperative (Wallace *v.* U. S., No. 34104, Court of Claims, Mar. 22, 1920.) See also A. W. 118.

16. Superintendent of the Military Academy.—The superintendent of the Military Academy was authorized by R. S. 1326 to convene general courts-martial for the trial of cadets only; the act of March 2, 1913 (37 Stat., 722), extended this authority to include all persons (except officers) subject to military law under his command. This authority was continued in the codes of 1916 and 1920. (A. W. 8, 12.)

17. "Accuser" or "Prosecutor."— Whether the commander who convened the court is to be regarded as the "accuser or prosecutor" where he has had to do with the preparing and preferring of the charges, is mainly to be determined by his animus in the matter. He may, like any other officer, initiate an investigation of an officer's conduct and formally prefer, as his individual act, charges against such officer; or by reason of a personal interest adverse to the accused he may adopt practically as his own charges initiated by another; in which cases he is clearly the accuser or prosecutor within the article. On the other hand, it is his duty to determine, when the facts are brought to his knowledge, whether an officer within his command charged with a military offense shall in the interest of discipline and for the good of the service be brought to trial. To this end he may (after proper investigation has been had and after receiving the advice of his staff judge advocate thereon) formally refer for trial charges preferred against such officer by another; or when the facts of an alleged offense are communicated to him, he may direct a suitable officer, as a member of his staff, or the proper commander of the accused, to investigate the matter, with a view to formulating and preferring such charges as the facts may warrant, and after having been regularly investigated and submitted to him, he may refer them for trial as in other cases; all this he may do in the proper performance of his official duty without becoming the accuser or prosecutor in the case. On the other hand, it is not essential that the commander who convenes the court-martial for the trial of an officer should sign the charges to

make him the "accuser or prosecutor" within the meaning of this article. Nor is the fact that they have been signed by another conclusive on the question whether the convening commander is the actual accuser or prosecutor. The objection that such commander is such, calls in question the legal constitution of the court, and while such objection, if known or believed to exist, should regularly be interposed at or before the arraignment, it may be taken during the trial at any stage of the proceedings. If not admitted by the prosecution to exist, the accused is entitled to prove it like any other issue. (For decisions as to when the convening authority is the accuser or prosecutor, see Digest, p. 155, LXXII, I, 1, *a*; p. 155, LXXII, I, 2; p. 156, LXXII, I, 3, *a*; p. 156, LXXII, I, 3, *a* (1).)

18. Power to Appoint an Attribute of Command.—As the authority to appoint general courts-martial is an attribute of command, a commanding officer can not delegate to another officer, such as his adjutant or any other staff officer or subordinate, the authority to appoint a court, detail an additional member, or relieve a member, or to appoint or relieve the trial judge advocate or defense counsel, or assistants to either. Where the authority to appoint a general court-martial is vested in a commanding officer, he retains that authority, wherever he may be, so long as he continues to be such commanding officer. In the absence of orders or legislation, personal presence within the territorial limits of his area or department is not essential to the validity of commands given by an area or department commander to be executed within the area or department. Therefore he may appoint a court-martial while absent from his area or department, if he continues to exercise command. But an area or department commander detached and absent from his command for any considerable period by reason of having received a leave of absence (whether of a formal or informal character), or having been placed upon a distinct and separate duty, is held to be in a status incompatible with a full and legal exercise of such authority, and therefore incompetent during such absence to order a general court-martial as an area or department commander, even though no other

officer has been assigned or has succeeded to the command of the area or department. (Digest, p. 153, LXXII, A.)

19. Rank of Appointing Authority.—The power of the various commanders enumerated in paragraph 14, supra, to appoint general courts-martial is independent of their rank, but no officer other than those enumerated can appoint a general court-martial no matter what his rank may be. An officer who succeeds to any command or duty stands in regard to his duties in the same situation as his predecessor. In the event of the death or disability of the permanent commander of a territorial area or department, or his temporary absence from the limits of his command, the senior line officer present and on duty therein will exercise the command of the area or department, unless otherwise ordered, until relieved by proper authority.

20. Power of Appointing Authority, How Limited.—An officer who has power to appoint a court-martial may control its existence, dissolve it, and determine the cases to be referred to it for trial, but he can not control the exercise by the court of powers vested in it by law.

Section II.

SPECIAL COURTS-MARTIAL.

21. Authorities Enumerated. — Special courts-martial may be appointed by the following authorities (A. W. 9), viz:

(*a*) The commanding officer of a district.
(*b*) The commanding officer of a garrison.
(*c*) The commanding officer of a fort.
(*d*) The commanding officer of a camp.
(*e*) The commanding officer of any place other than (*a*), (*b*), (*c*), and (*d*) where troops are on duty.
(*f*) The commanding officer of a brigade.
(*g*) The commanding officer of a regiment.
(*h*) The commanding officer of a detached battalion.
(*i*) The commanding officer of any other detached command.

Exception.—When any one of the foregoing commanding officers is the accuser or the prosecutor of the person or per-

sons to be tried, the court shall be appointed by superior authority.

When any superior authority deems it desirable, he may appoint a special court-martial for any part of his command.

NOTE.—For the authority to appoint special courts-martial in the National Guard not in the service of the United States, see section 104, act of June 3, 1916, 39 Stat. 208; Appendix 2, infra.

22. COMMANDING OFFICER AS "ACCUSER OR PROSECUTOR."—The rules laid down in Section I, paragraph 17, supra, for determining when a commander is the accuser or prosecutor apply equally to trials by special courts-martial. When a superior appoints a court because of such disqualification on the part of a subordinate commanding officer, he will specify in the order the names of the person or persons to be tried, and the court will adjourn sine die upon the completion of the last case which it is ordered to try.

23. RANK OF APPOINTING AUTHORITY.—As in the case of general courts-martial, the test of the power to appoint a special court-martial is whether the officer is one of the commanders designated in A. W. 9. Such authority is an incident of his power to command, and is independent of his rank.

24. COMMANDING OFFICER AS MEMBER.—When but two officers in addition to the commanding officer are available for detail on a special court-martial, the commanding officer will not detail himself as a member of such court. In such a case, if superior authority desires to appoint a special court-martial for such command, the commanding officer, if otherwise eligible, may be appointed as a member thereof.

SECTION III.

SUMMARY COURTS-MARTIAL.

25. AUTHORITIES ENUMERATED.—Summary courts-martial may be appointed by the following authorities (A. W. 10), viz:

(*a*) The commanding officer of a garrison.
(*b*) The commanding officer of a fort.
(*c*) The commanding officer of a camp.

(*d*) The commanding officer of any other place not enumerated in (*a*), (*b*), and (*c*) where troops are on duty.
(*e*) The commanding officer of a regiment.
(*f*) The commanding officer of a detached battalion.
(*g*) The commanding officer of a detached company.
(*h*) The commanding officer of any other detachment not enumerated in (*f*) and (*g*).

A summary court-martial may in any case be appointed by superior authority when by the latter deemed desirable.

NOTE.—For the authority to appoint summary courts-martial in the National Guard not in the service of the United States, see section 105, act of June 3, 1916, 39 Stat. 208; Appendix 2, infra.

26. WHEN MORE THAN ONE OFFICER PRESENT.—When more than one officer is present the summary court-martial will be appointed from staff officers or available line officers junior to the commanding officer. The commanding officer will not in such cases designate himself as the summary court-martial. The senior officer on duty at a recruiting station is a "commanding officer" in the sense of the last preceding sentence when there is another officer present at the same station, even though the latter may be serving at an auxiliary or branch station. (Bul. 46, War Dept., Oct. 24, 1914.)

27. WHEN BUT ONE OFFICER PRESENT.—When but one officer is present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him. (A. W. 10.) In such a case, no order appointing the court will be issued, but the officer will enter on the record that he is the "only officer present with the command." (As to retired officers, see par. 9, *b*, supra.)

28. "DETACHMENT" DEFINED.—A battalion or other unit is "detached" when isolated or removed from the immediate disciplinary control of a superior of the same branch of the service in such a manner as to make its commander primarily the one to be looked to by superior authority as the officer responsible for the administration of the discipline of the enlisted men composing the same. The term

is used in a disciplinary sense, and is not necessarily limited to what constitutes detachment in a physical or tactical sense. The commanding officers of such units as field signal battalions, aero squadrons, field bakeries, and ammunition, engineer, or sanitary trains, if their respective commands are independent, except in so far as they constitute parts of a division, and if their commanders are responsible directly to the division commander for the maintenance of discipline in those commands, are competent to appoint summary courts for the same, subject to the power of the division commander to appoint summary courts for all subordinate organizations and detachments under his command if by him deemed advisable.

So likewise the various service schools, such as The Cavalry School at Fort Riley, though they may be located within the immediate limits of higher commands, constitute "detachments" within the meaning of A. W. 10, and the commandants thereof have power to appoint summary courts-martial for the trial of enlisted men connected with such schools, subject to the right of the commanding officer of the garrison or fort to appoint such courts when by him deemed desirable. (Bul. 13, War Dept., 1913, p. 7.)

29. Power of Brigade Commanders.—A brigade commander is responsible for the instruction, tactical efficiency and preparedness for war service of his brigade. If the brigade is serving at one garrison or post he has, by virtue of his power as such garrison or post commander, authority to retain within himself the appointing power of all summary courts within his command, but if he does not exercise the authority which is vested in him by statute he allows the appointing power, including the power of review, to pass to regimental (and detachment) commanders. (Digest, p. 580, XVI, E, 7.) If the brigade is acting as a tactical unit in the field, he may as superior authority, appoint summary courts-martial for his command whenever he deems it desirable, but such authority will ordinarily be exercised by the regimental commanders.

SECTION IV.

TRIAL JUDGE ADVOCATE.

30. POWER TO APPOINT.—For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate, and for each general court-martial one or more assistant trial judge advocates when necessary. (A. W. 11.)

31. DUTIES OF TRIAL JUDGE ADVOCATE AND ASSISTANT TRIAL JUDGE ADVOCATES.—For discussion of duties of the trial judge advocate and his assistants see Chapter VII, Sections II and III.

SECTION V.

DEFENSE COUNSEL.

31a. Power to Appoint.—For each general or special court-martial the authority appointing the court shall, in the convening order, appoint a defense counsel, and for each general court-martial one or more assistant defense counsel when necessary. (A. W. 11.)

NOTE.—The code of 1920 introduced the statutory requirement that defense counsel for general and special courts-martial, together with assistant defense counsel where deemed necessary by the appointing authority for general courts-martial, must be appointed at the same time and in the same manner as trial judge advocates and assistant trial judge advocates. This embodied in statutory form the principle of the amendment of paragraph 108, Manual for Courts-Martial of July 14, 1919.

31b. Assistant Defense Counsel—Appointment.—Unless it can not be done without manifest injury to the service, assistant defense counsel will be appointed for a general court-martial whenever an assistant trial judge advocate is appointed. If more than one assistant trial judge advocate is appointed, a corresponding number of assistant defense counsel will, as a rule, be appointed.

31c. Duties of Defense Counsel and Assistant Defense Counsel.—For discussion of the duties of the defense counsel and his assistants see Chapter VII, Section IV.

CHAPTER IV.

COURTS-MARTIAL—JURISDICTION.

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Section I.

JURISDICTION IN GENERAL.

32. Jurisdiction Defined.—The jurisdiction of a court-martial is its power to try and determine cases legally referred to it and, in case of a finding of guilty, to award a punishment for the offense within its prescribed limits. Being courts of special and limited jurisdiction, their organization, powers, and mode of procedure must conform to all the statutory provisions relating to their jurisdiction. For the source and kinds of military jurisdiction and persons subject to military law, see Chapter I, Sections I and III.

33. Courts-martial Not Part of Ordinary Federal Judicial System.—While courts-martial have no part of the jurisdiction set apart under the article of the Constitution which relates to the judicial power of the United States, they have an equally certain constitutional source. They are established under the constitutional power of Congress to make rules for the government and regulation of the land forces of the United States, and are recognized in the provisions of the fifth amendment, expressly exempting "cases arising in the land and naval forces" from the requirement as to presentment and indictment by grand jury. They are tribunals appointed by military orders issued under authority of law. The power to appoint them, as well as the power to act upon their proceedings, is vested by law in certain commanding officers. Their jurisdiction is entirely penal or disciplinary. They have no power to adjudge damage for personal injuries or private wrongs, nor to collect private debts. Their judgments upon subjects within their limited jurisdiction, when duly approved or confirmed, are as legal and valid as those of any other tribunals. No appeal can be taken from them, nor can they be set aside, or reviewed by the courts of the United States, nor of any State, but United States courts may, on a writ or habeas corpus, inquire into the legality of detention of a person held by military authority, at any time, either before or during trial or while serving sentence, and will order him discharged, if it appears to the satisfaction of the court that any of the statutory requirements conferring jurisdiction have not been fulfilled. Their sentences have in themselves no legal effect until they have received the approval or confirmation of the proper commanding officer. With such approval or confirmation, however, their sentences become operative and are as effective as the sentences of civil courts having criminal jurisdiction, and are entitled to the same legal consideration.

33a. Their Nature.—While courts-martial are not a part of the Federal judicial system, they exercise within the Army functions of a purely judicial nature, for the maintenance of discipline and good order; and are, no less than other courts, governed by law.

NOTE.—"The whole proceeding from its inception is judicial. The trial, finding, and sentence are the solemn acts of a court organized

and conducted under the authority and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor entitled to protection from the uncontrolled will of any man, but which must be adjudged according to law. And the act of the officer who reviews the proceedings of the court, whether he be the commander of the fleet or the President, and without whose approval the sentence can not be executed, is as much a part of this judgment, according to law, as is the trial or the sentence." (11 Ops. Atty. Gen., 19, 21.)

"Courts-martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced." (Grafton v. U. S., 206 U. S., 333, 347–348.)

34. Conditions Necessary to Show Jurisdiction.—The jurisdiction of every court-martial, and hence the validity of each of its judgments, is conditioned upon these indispensable requisites:

(*a*) That it was convened by an officer empowered to appoint it.

(*b*) That the persons who sat upon the court were legally competent to do so.

(*c*) That the court thus constituted was invested by the acts of Congress with power to try the person and the offense charged.

(*d*) That its sentence was in accordance with law.

"Persons, then belonging to the Army and the Navy are not subject to illegal or irresponsible courts-martial, when the law for convening them and directing their proceedings of organization and for trial have been disregarded. In such cases everything which may be done is void—not voidable but void—and civil courts have never failed, upon a proper suit, to give a party redress who has been injured by a void process or void judgment. * * * When we speak of proceedings in a cause, or for the organization of the court and for trials, we do not mean mere irregularity in practice on the trial, or any mistaken rulings in respect to evidence or law, but a disregard of the essentials required by the statute under which the court has been convened to try and to punish an offender for an imputed violation of the law." (Dynes *v.* Hoover, 61 U. S., 81; see also Deming *v.*

McClaughry, 113 Fed. Rep., 650; McClaughry *v.* Deming, 186 U. S., 63; Mullan *v.* United States, 140 U. S., 240; Ex parte Tucker, 212 Fed. Rep., 569; and A. W. 37.)

35. Procedure When Military and Civil Jurisdiction Concurrent.—Courts-martial have exclusive jurisdiction to try persons subject to military law for all purely military crimes and offenses; they have concurrent jurisdiction with the proper civil courts to try such persons for civil crimes and offenses denounced and punished under A. W. 92, 93, 94, and 96. (For limitation as to the crimes of murder and rape, see A. W. 92.) In accordance with a principle of comity as between the civil and military tribunals in cases of concurrent jurisdiction, the jurisdiction which first attaches in a particular case is entitled to proceed to its termination. This is, however, not an inflexible rule and need not govern the action of the military authorities in the case of an accused person demanded by the civil authorities to answer for an offense which is primarily one against the civil community.

When any person subject to military law, except (*a*) one who is held by the military authorities to answer, or (*b*) who is awaiting trial, or (*c*) result of trial, or (*d*) who is undergoing sentence for a crime or offense punishable by the Articles of War, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, *except in time of war*, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

When, under the provisions of this article, delivery is made to the civil authorities of an offender undergoing sentence of a court-martial, such delivery, if followed by con-

viction, shall be held to interrupt the execution of the sentence of the court-martial, and the offender shall be returned to military custody, after having answered to the civil authorities for his offense, for the completion of the said court-martial sentence. (A. W. 74.) When offenses against the peace and good order of civil communities are committed by persons subject to military law, the proper military authorities will be prompt in the preferring of charges and the arraignment of offenders, having due regard for arrangements existing for the purpose of securing between the authorities of the two jurisdictions, civil and military, mutual aid and cooperation in the administration of justice. In such cases, if, after charges are preferred, the officer competent to order trial by the proper court-martial deems it inadvisable to bring the case to trial, he will hold the offender and forward the charges, with his views thereon, to The Adjutant General of the Army.

36. Can Not Be Divested by Act of Accused.—A court-martial having once duly assumed jurisdiction of a case, can not, by any wrongful act of the accused, be ousted of its authority or discharged from its duty to proceed fully to try and determine according to law and its oath. Thus the fact that, after arraignment and during the trial, the accused has escaped from military custody furnishes no ground for not proceeding to a finding, and, in the event of conviction, to a sentence in the case; and the court may and should find and sentence as in any other case. During such absence it is proper for his counsel to continue to represent him in all respects as though present.

37. Not Territorial.—Military jurisdiction is not territorial. It extends as to persons legally subject to it to offenses committed by them in any place whatsoever, whether within or beyond the territorial jurisdiction of the United States.

NOTE.—Herein military jurisdiction differs sharply from the jurisdiction of civil courts. The latter are created for certain districts, counties or other geographical subdivisions, to which their jurisdiction is limited. The have no jurisdiction beyond such geographical limits or over any offense not committed within such boundaries. The jurisdiction of military courts is, on the contrary, not so limited.

Hence the rules of civil courts relating to "venue" have no application in military courts.

38. When Terminated—Rule Stated.—The jurisdiction of courts-martial over officers, cadets, soldiers, and other persons in the military service of the United States, ordinarily ends when they become separated from the service. The following are, however, exceptions to this general rule:

(*a*) If any person, being guilty of any of the offenses of fraud, embezzlement, etc., against the United States, while in the military service of the United States, receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed. (A. W. 94.)

(*b*) When any officer, dismissed by order of the President, makes, in writing, an application for trial, setting forth, under oath, that he has been wrongfully dismissed, the President shall, as soon as the necessities of the service may permit, convene a court-martial to try such officer on the charges on which he shall have been dismissed, and if a court-martial is not so convened within six months from the date of the making of such application for trial, or if such court, being convened, does not award dismissal or death as the punishment of such officer, the order of dismissal by the President shall be void. (R. S. 1230.)

NOTE 1.—This has no reference to an officer discharged from the Army by reason of being classified in class B, under section 24b of the National Defense Act as amended by the act of June 4, 1920 (41 Stat. 773). An officer so discharged is not entitled to demand a trial by court-martial under R. S. 1230.

Note 2.—In time of peace no officer shall be dismissed except in pursuance of the sentence of a court-martial or in mitigation thereof. (A. W. 118.) An officer discharged from his office by the President under section 9 of the selective-draft act is not entitled to demand a trial by court-martial. (Dig. Ops., J. A. G., May, 1918, Office IV E.)

NOTE 3.—The President may at any time drop from the rolls of the Army any officer who has been absent from duty three months without leave, or who has been absent in confinement in a prison or penitentiary for three months after final conviction by a court of competent jurisdiction. (A. W. 118; R. S. 1229; act of Jan. 19, 1911, 36

Stat., 894.) When an officer's name is so dropped from the rolls by the President the officer is thereby fully separated from the military service and becomes a civilian (par. XX E, Dig. Ops. J. A. G., p. 426; 2d Ind., Mar. 25, 1920, J. A. G. 300.2; 2d Ind., June 16, 1920, J. A. G., 210.14); subject, however, to his right to have a court-martial convened to try him on the charges on which he shall have been dismissed, under section 1230, R. S.

NOTE 4.—The Court of Claims has held section 1230, R. S., to be inoperative. (See note to par. 15, supra.)

(*c*) All persons under sentence adjudged by courts-martial remain subject to military law while under such sentence. (A. W. 2.)

(*d*) Where a soldier obtains his discharge by fraud, the discharge may be canceled and the soldier arrested and returned to military control. He may also be required to serve out his enlistment and may be tried for his fraud. (Digest, p. 457, XVI, A. 3.)

(*e*) An honorable discharge releases from the particular contract and term of enlistment to which it relates, and does not therefore relieve the soldier from the consequences of a desertion committed during a prior enlistment. (Digest, p. 462, XXII, A.)

NOTE.—For an offense committed prior to the expiration of his term of enlistment, a soldier may be held in the service and tried after the expiration of his term. So, also, a soldier may be tried for offenses committed while making good time lost through desertion, through absence without leave, through disease or injury, the result of his own misconduct, etc., under A. W. 107.

SECTION II.

JURISDICTION OF GENERAL COURTS-MARTIAL.

39. PERSONS AND OFFENSES—GENERAL COURTS-MARTIAL have power (A. W. 12) to try—

(*a*) Any person subject to military law, for

(*b*) Any crime or offense made punishable by the Articles of War.

NOTE.—No officer shall be brought to trial before a general court-martial appointed by the Superintendent of the Military Academy. (A. W. 12.)

In addition they have power to try—

(*c*) Any person other than (*a*) above, who by the law of war is subject to trial by military tribunals, for

(*d*) Any crime or offense in violation of the law of war.

40. LIMITS OF PUNISHMENT — EXCEPTION. — Punishment upon conviction is discretionary with a general court-martial, except—

(*a*) When mandatory under the law, or

(*b*) When limited by order of the President under A. W. 45; in addition,

(*c*) The death penalty can be imposed only when specifically authorized; and

(d) Except for—

(a) Desertion in time of war,

(b) Repeated desertion in time of peace, or

(c) Mutiny,

no person shall under the sentence of a court-martial be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States of general application within the continental United States (excepting sec. 289, Penal Code of the United States, 1910), or by the law of the District of Columbia, or by way of commutation of a death sentence, and unless, also, the period of confinement authorized and adjudged by such court-martial is more than one year. (A. W. 42.)

(e) In time of peace, the period of confinement in a penitentiary shall in no case exceed the maximum period prescribed by the law which, under the forty-second article of war, permits confinement in a penitentiary (see (d) supra); unless, in addition to the offense so punishable under such law, the accused shall have been convicted at the same time of one or more other offenses. (A. W. 45.)

Exception.—When a sentence of confinement is adjudged by a court-martial upon conviction of two or more acts or omissions any one of which is punishable by confinement in a penitentiary, the entire sentence of confinement may be executed in a penitentiary.

NOTE 1.—The death penalty is mandatory in the case of spies (A. W. 82); dismissal is mandatory for conduct unbecoming an officer and gentleman (A. W. 95); either death or imprisonment for life is mandatory for murder and rape (A. W. 92); punishment is mandatory in part and discretionary in part for false muster (A. W. 56); false returns (A. W. 57), officer drunk on duty in time of war (A. W. 85), and personal interest in the sale of provisions (A. W. 87). For limits of punishment fixed by the President under A. W. 45, see Chapter XIII, infra, Punishments.

NOTE 2.—For discussion of places of confinement and of penitentiary confinement, and of the War Department policy regarding punishments, see Chapter XIII, post, "Punishments," Sections II and III.

NOTE 3.—For a conviction where the death penalty is mandatory, or for a sentence of death, a unanimous vote of all the members of the court present is required; and for a sentence to life imprisonment, or to confinement for more than 10 years, a three-fourths vote. All other convictions and sentences require a two-thirds vote. (A. W. 43.) See, infra, par. 308.

NOTE 4.—An officer may not be sentenced to a reduction in rank; since that would involve the power of appointment to the lower grade, which is beyond the power of the court.

SECTION III.

JURISDICTION OF SPECIAL COURTS-MARTIAL.

41. PERSONS AND OFFENSES.—Special courts-martial shall have power (A. W. 13) to try—

(1) Any person subject to military law, except—

Any person subject to military law belonging to a class or classes excepted by the President, by regulations, for

(2) Any crime or offense (not capital) made punishable by the Articles of War.

NOTE.—For classes of persons exempted by the President, by regulations, from the jurisdiction of special courts-martial, see Appendix 21.

The following are capital crimes and offenses under the Articles of War, viz:

(1) *At all times.*—(*a*) Assaulting or disobeying a superior officer (A. W. 64); (*b*) mutiny or sedition (A. W. 66); (*c*) failure to suppress mutiny or sedition (A. W. 67); (*d*) murder, rape (A. W. 92).

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(2) *War offenses.*—(a) Desertion (A. W. 58); (*b*) advising or aiding another to desert (A. W. 59); (*c*) misbehavior before the enemy (A. W. 75); (*d*) compelling or attempting to compel a commander to surrender (A. W. 76); (*e*) improper use of countersign (A. W. 77); (*f*) forcing a safeguard (A. W. 78); (*g*) relieving, corresponding with, or aiding the enemy, or attempting to relieve the enemy (A. W. 81); (*h*) spies (A. W. 82); (*i*) misbehavior of sentinel (A. W. 86).

41a. The second proviso to the twelfth article of war, which was added by the revision of 1920, provides—

> "That the officer competent to appoint a general court-martial for the trial of any particular case may, when in his judgment the interest of the service shall so require, cause any case to be tried by a special court-martial notwithstanding the limitations upon the jurisdiction of the special court-martial as to offenses set out in article 13; but the limitations upon jurisdiction as to persons and upon punishing power set out in said article shall be observed."

The purpose of the amendment is to enlarge the jurisdiction of the special court-martial to embrace all offenses committed by any person subject to military law, except persons belonging to any class or classes exempted from the jurisdiction of the special court-martial by the President by regulations. It does not enlarge the punishing powers of the special court-martial. "The fundamental idea is that many of our articles denounce offenses as capital, which, when committed under certain circumstances, are really of no vital import to the service. The amendment" confides "to the officer exercising general court-martial jurisdiction a discretion whereby he may either send cases before a general court or have them disposed of by one of the inferior courts. The effect of this modification ought to be a very considerable reduction in the number of cases tried by general courts-martial." (Report, Kernan Board, p. 21.)

42. LIMITS OF PUNISHMENT.—A special court-martial shall not have power to adjudge—

(*a*) Dishonorable discharge of an enlisted man. (A W. 108);

(*b*) Dismissal of an officer (A. W. 118);

(*c*) Confinement in excess of six months (A. W. 13); nor

(*d*) Forfeiture of more than two-thirds pay per month for a period of not exceeding six months. (A. W. 13.)

NOTE.—Reduction to the ranks in the case of noncommissioned officers and reduction in classification of privates may be effected by sentence of special court-martial except as the Executive order concerning maximum punishments, or this Manual, or other regulations or War Department orders may from time to time exempt such persons from the jurisdiction of special courts or may prohibit such reduction. (But see Appendix 21.)

SECTION IV.

JURISDICTION OF SUMMARY COURTS-MARTIAL.

43. PERSONS AND OFFENSES.—Summary courts-martial shall have power (A. W. 14) to try—

(1) Any person subject to military law, except—

(*a*) An officer;

(*b*) A member of the Army Nurse Corps;

(*c*) A warrant officer;

(*d*) An Army field clerk;

(*e*) A field clerk Quartermaster Corps;

(*f*) A cadet;

(*g*) A soldier holding the privileges of a certificate of eligibility to promotion;

(*h*) A noncommissioned officer who objects thereto (without the authority of the officer competent to bring him to trial before a general court-martial).

NOTE.—If the accused be a noncommissioned officer he will be asked, at the outset of the trial, whether he objects to trial by summary court-martial, and the fact of his being so asked, and his answer to the question, will be written down in the record and in the report of trial.

(*i*) Any person belonging to a class or classes excepted from the jurisdiction of summary courts-martial by the President, by regulations; for

(2) Any crime or offense (not capital) made punishable by the Articles of War.

NOTE 1.—For list of capital crimes under the Articles of War see Section III, paragraph 41, supra.

NOTE 2.—For classes of persons exempted by the President, by regulations, from the jurisdiction of summary courts-martial, see Appendix 21.

44. LIMITS OF PUNISHMENT.—A summary court-martial shall not have power to adjudge—

(*a*) Dishonorable discharge (A. W. 108);

(*b*) Confinement in excess of one month;

(*c*) Restriction to limits for more than three months;

(*d*) Forfeiture of more than two-thirds of one month's pay; nor

(*e*) Detention of more than two-thirds of one month's pay. (A. W. 14.)

NOTE.—Reduction to the ranks in the case of noncommissioned officers and reduction in classification of privates may be effected by sentence of summary court-martial, except as the Executive order concerning maximum punishments, or this Manual, or other regulations or War Department orders may from time to time exempt such persons from the jurisdiction of summary courts or may prohibit such reduction. (But see Appendix 21.)

SECTION V.

JURISDICTION OF OTHER MILITARY TRIBUNALS.

45. WHEN CONCURRENT WITH COURTS-MARTIAL.—The provisions of the articles of war conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals. (A. W. 15.)

CHAPTER V.

COURTS-MARTIAL—PROCEDURE PRIOR TO TRIAL.

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Section I.

ARREST AND CONFINEMENT.

46. Arrest or Confinement of Accused Persons.—(a) A person charged with an offense will not be placed either in arrest or confinement (nor continued therein if arrested or confined at any time) before trial, unless the commanding officer, in cases where (1) a crime or a serious offense under the Articles of War is charged, or (2) in exceptional circumstances, although the charge is only of a minor offense, considers arrest or confinement necessary for the purpose of holding the accused at the post or of preventing his escape.

NOTE.—A. W. 69 as amended by the code of 1920 does away with prior provisions contemplating different treatment of officers and enlisted men charged with offenses, and makes identical provisions relating thereto for all persons subject to military law.

(*b*) Any person placed in arrest under the provisions of this article (A. W. 69) shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer or cadet who breaks his arrest or who escapes from confinement, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be dismissed from the service or suffer such other punishment as a court-martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be punished as a court-martial may direct. (A. W. 69.)

NOTE.—A failure to place a person subject to military law in arrest or confinement or the disregard of any custom or formality connected therewith does not affect the jurisdiction of a court.

47. WHO MAY ORDER ARRESTS.—(*a*) Only commanding officers have power to place officers in arrest, except as provided in A. W. 68.

NOTE.—The "commanding officer" thus authorized is the commander of the regiment, separate company, detachment, post, department, etc., in which the officer is serving. Digest, p. 481, I D. 1.

(*b*) A trial judge advocate of a court-martial has no authority to place in arrest an officer or soldier about to be tried by the court, or to compel the attendance of the accused before the court by requiring a noncommissioned officer to bring him, or otherwise. These are duties which devolve upon the convening authority or upon the post commander or other proper officer in whose custody or command the accused is at the time. (Digest, p. 498, IV, B, 5.)

(*c*) A court-martial has no control over the nature of the arrest or other status of restraint of a prisoner except as regards his personal freedom in its presence. It can not place an accused person in arrest or confinement nor can the court, even with a view to facilitate his defense, interfere to cause a close arrest to be enlarged. The officer in command is alone responsible for the prisoners in his charge. (Davis, p. 62.)

But the court may, and in a proper case should, either on its own motion, or on that of the trial judge advocate or of the ac-

cused or his counsel, make such recommendations on this subject, to the appointing authority, as it may deem fit.

48. ARREST, HOW EXECUTED.—An officer is placed in arrest by his commanding officer in person or through another officer, by a verbal or written order or communication, advising him that he is placed in arrest, or will consider himself in arrest, or words to that effect.

49. STATUS OF OFFICER IN ARREST.—An officer in arrest can not exercise command of any kind. He will not wear a sword nor visit officially his commanding or other superior officer, unless directed to do so. His applications and requests of every nature will be made in writing.

50. ARREST OF OFFICER WITHOUT PREFERRING CHARGES.—Officers will not be placed in arrest for light offenses. For these the censure of the commanding officer will generally answer the purpose of discipline. Whenever a commanding officer places an officer in arrest without preferring charges, he will make a written report of his action to the brigade or Coast Artillery district commander, stating the cause. The brigade or Coast Artillery district commander, if he thinks the occasion requires, will call on the officer arrested for any explanation he may desire to make, and take such other action within his authority as he may think necessary, forwarding the papers, with his recommendation, to the area or department commander, who will, in case a trial is not deemed advisable, forward the papers to The Adjutant General of the Army for file with the officer's record, or for further action. In the case of officers belonging to organizations not attached or belonging to a brigade or Coast Artillery district, the report will be sent directly to the officer exercising general court-martial jurisdiction.

[*Paragraph 51 is omitted in this revision, in view of paragraph 46, supra.*]

52. ARREST AND CONFINEMENT OF SOLDIERS.—Except as provided in A. W. 68, or when immediate restraint is necessary, no soldier will be confined without the order of an officer, who shall previously inquire into his offense; it is proper, however, for a company commander to delegate to noncommissioned officers of his company the power to place

enlisted men in arrest as a means of restraint at the instant when restraint is necessary, but such action must be reported to the company commander at once. (Digest, p. 481, I, E. 1.)

NOTE.—The chief object of Congress in changing, by the code of 1920, the provisions of A. W. 69 relating to arrest and confinement was to lessen resort to confinement, particularly of enlisted men, in cases where restraint is not a necessity, either to prevent the escape of the accused or to restrain him from further violence or for other like reasons. No soldier or officer will be ordered into, or retained in, confinement prior to trial by court-martial except where confinement is necessary for one of the reasons indicated.

53. STATUS OF Warrant Officer OR NONCOMMISSIONED OFFICER IN ARREST.—Warrant officers and noncommissioned officers will not be confined in company with privates if it can be avoided. When placed in arrest, they will not be required to perform any duty in which they may be called upon to exercise authority or control over others, and when placed in confinement, they will not be sent out to work.

[*Paragraph 54 omitted in this revision.*]

55. REFUSAL TO RECEIVE AND KEEP PRISONERS.—No provost marshal or commander of a guard shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States, provided the officer committing shall, at the time, deliver an account in writing, signed by himself, of the crime or offense charged against the prisoner. Any officer or soldier so refusing shall be punished as a court-martial may direct. (A. W. 71.)

NOTE.—A. W. 72 requires every commander of a guard to submit a report in writing to his commanding officer within 24 hours after the confinement of a prisoner (or as soon as he is relieved from his guard) showing (*a*) the name of such prisoner, (*b*) the offense charged against him, and (*c*) the name of the officer committing him. Such report is ordinarily contained in the "Guard report" and presented to the commanding officer by the old officer of the day at guard mounting. For duty of commanding officers to surrender prisoners to civil authorities, see paragraph 35, supra.

56. PLACING PRISONERS IN IRONS.—Prisoners will not be placed in irons except in the extraordinary case of a prisoner who, in the judgment of the commanding officer, is a desperate or dangerous character, in which case report of

action and the circumstances will be immediately made to the area or department or tactical division commander. When a prisoner is removed from irons a report of that action will be made to the area or department or tactical division commander. A prisoner may be shackled or handcuffed while being transported from one post to another, or from a post to a penitentiary, when, in the judgment of the officer in charge, the escape of the prisoner can not otherwise be prevented.

57. Releasing Prisoner without Proper Authority.—Any person subject to military law, who, without proper authority, releases any prisoner duly committed to his charge, or who, through neglect or design, suffers any prisoner so committed to escape, shall be punished as a court-martial may direct. (A. W. 73.)

Section II.

ARREST OF DESERTERS BY CIVIL AUTHORITIES.

58. Authority for Apprehension.—It shall be lawful for any civil officer having authority under the laws of the United States, or of any State, Territory, District, or possession of the United States, to arrest offenders, summarily to arrest a deserter from the military service of the United States and deliver him into the custody of the military authorities of the United States. (A. W. 106.)

59. Authority of Citizens Other Than Peace Officers to Arrest Deserters.—The statute conferring authority upon civil officers to apprehend and deliver deserters (A. W. 106) should not be construed as taking away the authority for their apprehension by a citizen under an order or direction of a military officer, but the legislation should be treated as providing an additional means of securing the arrest of deserters by conferring authority upon civil officers to apprehend them without military orders—leaving the former method still legal. The offer of reward for the apprehension and delivery of a deserter, coupled with the act of Congress which provides for the payment of such a re-

ward, is considered sufficient authority for the arrest of the deserter by a citizen. (C–17327–A. J. A. G., July 20, 1909.)

60. Minority of Deserter.—The right of the United States to arrest and bring to trial a deserter is paramount to any right of control over him by a parent on the ground of his minority. (See Digest, p. 401, III, G; In re Cosenow, 37 Fed. Rep., 668; In re Kaufman, 41 Fed. Rep., 876; and compare In re Grimley, 137 U. S., 147, and In re Morrissey, 137 U. S., 157.)

CHAPTER VI.

COURTS-MARTIAL—PROCEDURE PRIOR TO TRIAL.

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SECTION I.

PREPARATION OF CHARGES.

61. DEFINITIONS.—A charge corresponds to a civil indictment. It consists of two parts—the technical "charge," which should designate the alleged crime or offense as a violation of a particular article of war or other statute, and the "specification," which sets forth the facts constituting the same. The requisite of a charge is that it shall be laid under the proper article of war or other statute; of a specification, that it shall set forth in simple and concise language facts sufficient to constitute the particular offense and in such manner as to enable a person of common understanding to know what is intended. The general term "charges," in the sense that the word "charge" is used in the first sentence of this paragraph, includes any number of technical charges and their specifications.

NOTE 1.—It is to be carefully borne in mind that every specification must state facts constituting some particular offense recognized and punishable either under the articles of war or some other Federal statute, civil or military, or statute for the District of Columbia, or at the common law as recognized in the District of Columbia, or by the unwritten law military, the "custom of war." Otherwise the specification is insufficient to support a sentence.

NOTE 2.—For forms for charges see Appendix 6.

62. WHO MAY INITIATE CHARGES.—Military charges, though commonly originating with military persons, may be initiated by civilians. Indeed, it is but performing a public duty for a civilian who becomes cognizant of a serious offense committed by any officer or soldier, or other person subject to military law, to bring it to the attention of the proper commander. But the law requires (A. W. 70) that charges and specifications must be signed and sworn to by a person subject to military law. Charges proceeding from a person outside the Army and based upon testimony not in the possession or knowledge of the military authorities, should, in general, be required to be sustained by affidavits or other reliable evidence, as a condition of their being adopted (Dig., p. 482, II, B); particularly since, under the code of 1920, the

formal charges and specifications must be substantiated by the oath of the person subject to military law who adopts and formally prefers them.

NOTE.—Prior to the code of 1920 charges and specifications were not required to be sworn to, but, by custom of the service, were formally preferred by—that is, authenticated by the signature of—a commissioned officer. The code of 1920 (A. W. 70) introduced the requirement that all charges and specifications be preferred under oath, and provided that they may be preferred by any person subject to military law, thus doing away with the prior custom of the service requiring them to be signed by a commissioned officer.

63. WHO MAY PREFER CHARGES.—Any officer or soldier or any other person subject to military law may prefer charges. An officer is not disqualified from preferring charges by the fact that he is himself under charges or in arrest (Dig., p. 483, II, C), or in confinement; nor is a soldier or other person subject to military law disqualified from preferring charges by reason of being himself under charges or in arrest or in confinement.

64. SIGNING and Swearing to CHARGES.—The person preferring charges will sign his name following the last specification, adding his rank and organization in the Army, or other words indicating his rank and status as a person subject to military law, and will append thereto his affidavit in accordance with the requirements of A. W. 70 and of paragraph 75, infra.

NOTE.—For form for affidavit see Appendix 5.

The signing of charges, like orders, with the name of an officer, adding "by order of" his commander, is not permissible since under the requirements of the code of 1920 (A. W. 70) no officer or other person can prefer charges unless he is able to make the required oath on his own responsibility that he has personal knowledge of, or has investigated the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief. The signature of the person preferring charges forms no part of the charges themselves, nor does the affidavit thereto appended, but such signature and affidavit will nevertheless be copied into the record of trial by a general or special court-martial in order that it may

affirmatively appear whether the person preferring the charges (who is prima facie the accuser) was an officer who sat as a member of the court (see A. W. 8, 9), and also that it may affirmatively appear in the record whether the charges were preferred, signed, and sworn to in accordance with the requirements of the law.

65. Accumulation of Charges.—It may sometimes be expedient, where the offenses are slight in themselves and it is deemed desirable to exhibit a continued course of conduct, to wait before preferring charges till a series of similar acts have been committed, provided the period be not unreasonably prolonged; but, in general, charges should be preferred and brought to trial immediately or presently upon the commission of the offenses. Anything like an accumulation or saving up of charges, through a hostile animus on the part of the accuser, is discountenanced by the sentiment of the service. (Digest, p. 490, II, F, 2.)

66. Duplication of Charges.—The duplication of charges for the same act or omission will be avoided except when by reason of lack of definite information as to available evidence it may be necessary to charge the same act or omission as constituting two or more distinct offenses. When the same act or omission in its different aspects is charged as constituting two or more offenses, the court, even though it arrives at a finding of guilty in respect of two or more specifications, should impose punishment only with reference to the act or omission in its most important aspect, and if this rule be not observed by the court the reviewing authority should take the necessary action. Thus a soldier should not be punished for disorderly conduct and for assault when the disorderly conduct consisted in making the assault. And so a person subject to military law should not be charged under A. W. 61 for failure to report for a routine duty at a time included in a period for which he is charged with absence without leave under the same article; otherwise, when the duty is not a routine duty. Routine duties are those that are regularly scheduled, such as reveille, retreat, stables, fatigue, schools, drills, and parades, but do not include practice marches or other previously specially

appointed and important exercises of which the accused is chargeable with notice.

67. Consolidation of Charges.—Ordinarily all the charges against the accused should be consolidated into one set of charges, and one trial had upon the consolidated set instead of having two or more trials, one upon each set. To avoid taking up unnecessarily the time of a court with minor offenses, where charges are preferred for serious offenses, there should not be joined with them charges for minor derelictions unless the latter serve to explain the circumstances surrounding the serious charges. For instance, charges for desertion should not ordinarily be joined with charges for losing through neglect, Government property of small value; nor should charges for willful disobedience of the orders of a commissioned officer ordinarily be joined with charges for an absence from a routine duty.

68. Refusal to Submit to Medical Treatment.—An officer or soldier may be charged for refusing to submit to a surgical or dental operation or medical or dental treatment at the hands of the military authorities if it is designed to restore or increase his fitness for service and is without risk of life.

A soldier who refuses to submit to a surgical operation that the attending surgeon certifies is without risk to his life and is necessary for the removal of a disability that prevents the full performance of any or all military duties that properly can be required of him will, for such refusal, be brought to trial by general court-martial; but if in any such case the attending surgeon is in doubt as to whether the proposed operation involves risk to life the soldier will not be brought to trial, but will be discharged on surgeon's certificate of disability. (Par. 53, C. of O., 1881–1915.)

69. Joint Charges.—Where two or more persons jointly and in pursuance of a common intent commit a crime or offense which can be committed by a combination of persons acting in concert they may be separately charged and tried for such crime or offense or may be jointly charged and jointly tried. The actual presence of all of the accused persons at the actual commission of the offense is not necessary, for all who take part in the enterprise are equally guilty, though they may be absent from the place of actual

commission of the offense with which they are charged. The fact that justice may require that different degrees of punishment be awarded to the different parties constitutes no objection to such a joint prosecution. The mere fact of their committing the same offense together and at the same time, although material as going to show concert, does not necessarily establish it. Thus the fact that several soldiers have absented themselves together without leave will not, in the absence of evidence indicating a concert of action, justify their being arraigned together on a joint charge, for they may merely have been availing themselves of the same convenient opportunity of leaving. Nor is desertion, unless in execution of a conspiracy, chargeable as a joint offense. (Digest, p. 484, II, D, 7.) In joint charges the form of the charge does not differ from that in other charges. The form of specification will read as follows:

In that Private ———, Company ———, ——— Infantry; Private ———, Company ———, ——— Infantry; and Private ———, Company ———, ——— Infantry, acting jointly, and in pursuance of a common intent, did [here allege the offense in the language prescribed where the offense is committed by only one person].

The right of challenge (including the right to one separate individual peremptory challenge) may, of course, be exercised separately by each of the accused.

70. Charges Not to be Preferred upon Uncorroborated Confession.—Charges should not be preferred for an offense unless there is some evidence other than the confession of the accused that the offense has been committed. This applies particularly in cases of fraudulent enlistment. The mere confession by the accused that he had prior service, or was under a certain disability at the time he enlisted, and concealed that fact, should not be made the basis for charges unless there is something confirming the confession. Charges should not be preferred in such cases until corroborating evidence that the offense was committed has been secured, or that, the existence of such evidence being ascertained, the necessary steps to obtain it have been taken. (See par. 225.)

71. Charges for Private Indebtedness.—The military authorities will not attempt to discipline officers and sol-

diers for failure to pay disputed private indebtedness or claims—that is, indebtedness or a claim where, in the opinion of the military authorities, there is a genuine dispute as to the facts or law—nor will the military authorities attempt to decide such disputed indebtedness or claims. If the indebtedness is disputed the creditor should resort to the civil courts to establish the liability. If, in the opinion of the military authorities, the facts and law are undisputed and there appears to the military authorities to be a private indebtedness, and the officer or soldier does not claim to have a legal or equitable set-off or counterclaim to urge against it, an officer may be brought to trial if his failure is considered to be a violation of A. W. 95 or A. W. 96, and a soldier may be tried if his failure is considered to be a violation of A. W. 96, but no action will be taken by the military authorities to enforce payment. If an officer or soldier by his conduct in incurring the indebtedness or by his attitude toward it or his creditor thereafter reflect discredit upon the service to which he belongs, he should be brought to trial for his misconduct. If the facts and law, in the opinion of the military authorities, are undisputed and there appears to the military authorities to be no indebtedness, the department will take no further action. Where a soldier was largely indebted and failed to pay his indebtedness and the commanding officer denied the soldier all pass privileges until the indebtedness was paid, it was held that such action on the part of the commanding officer constituted an attempt to enforce payment of the indebtedness and was contrary to the policy of the War Department and such action should be revoked. (Digest, p. 878, IV.)

72. Numbering Charges and Specifications.—Where there are several specifications under one article, the usual procedure is to place them all under one charge, rather than to make several charges with one specification under each. Where there are several specifications under one charge they will be consecutively numbered, and where there are several charges, the charges will be consecutively numbered.

73. Additional Charges.—New and separate charges which are preferred after others have been preferred are known in military law as "additional charges." Such

charges may relate to past transactions which were not known by or brought to the attention of the person framing the original charges at the time they were preferred; or they may, as is more frequent, arise from acts of the accused subsequent to the time the original charges were preferred. Thus, if after charges have been preferred he commits a "breach of arrest," an additional charge will properly be preferred in the case, and should be designated as an "additional" charge. Charges of this character do not require a separate trial, but may and preferably should be tried by the same court that tries the original charges, and at the same time, subject to the limitations regarding investigation and service of charges contained in A. W. 70. (See paragraphs 75, 76, 76a, and 76b, infra.) If practicable to consolidate the two sets of charges this should be done, otherwise the second set will be denominated "additional" charges. After the court has been duly sworn to try and determine "the matter now before it" additional charges which the accused has had no notice to defend and regarding which the right to challenge has not been accorded him, can not be introduced or the accused required to plead thereto. Such charges must await a separate trial. (See Winthrop, pp. 225, 226.)

74. Rules to be Observed in Pleading.—(*a*) *Statement of charge.*—The charge should be limited to a statement of the article violated, as "Violation of the fifty-eighth article of war," or "Violation of the eighty-fifth article of war." Common law and statutory crimes, not specified in the Articles of War, over which courts-martial have jurisdiction, should, if not capital, be charged under A. W. 96.

(*b*) *Statement of Specification.*—The specification must be appropriate to the charge. The offense must be distinctly and accurately described in the specification and the utmost care must be exercised that every element of the offense, as denounced at common law or in the article of war, or other statute, is set forth. (See forms, Appendix 6.) More specifically, (1) the name, rank, title, and organization of the accused person, if he belongs to the Army of the United States, will be stated; or if he is a civilian or other person not belonging to the Army of the United States, he will be so described that it appears

that he is a person subject to military law, or that he is by statute, or by the law of war, subject to trial by military tribunals; and (2) the facts that constitute the offense charged, and each element thereof, will be set out briefly, but clearly, together with the place and time of commission. The specification need not, however, possess the technical nicety of, or the same fullness of detail as is required in, an indictment at common law. In general, a bald statement of the facts in simple and concise, but accurate, language, in any such manner as to enable a person of common understanding to know what is intended and for exactly what offense it is contemplated the accused be tried, is sufficient; but this does not dispense with the requirement that every element of the offense must be set forth. The failure to set forth any essential element of the offense renders the specification defective. (See pars. 158*a*, and 158*b*, infra.)

(*c*) *Alternative Pleading.*—A specification should not allege two offenses in the alternative. For example, an offense under A. W. 84 can not be charged by the words, "did sell or through neglect lose." If, as the result of an investigation, there is doubt whether the property has been sold or lost, both offenses may be charged under separate specifications. Care will be taken in every case where an article of war includes two or more offenses to see that each specification alleges but a single offense. (See Digest, p. 487, II, D, 11, *d*.)

(*d*) *Evidence Not to Be Pleaded.*—It is not technically good pleading in alleging an offense to state the circumstances or evidence proving or tending to prove it, such as the acts, occurrences, and matters of description, which should properly form part of the testimony of witnesses; but there is no objection to stating very briefly in the specification the immediate result or effect of the act charged as a circumstance of description illustrating the character and extent of the offense committed. For instance, in charging a striking or doing a violence to a superior officer under A. W. 64, it is allowable, in a case where the assault was fatal, to add in the specification, "thereby causing his death", as indicating the measure of violence employed.

(Digest, p. 488, II, D, 14, *a*.) Unnecessarily "pleading the evidence" does not render the specification fatally defective. But circumstances thus alleged in detail, even though unnecessarily, must be proved at the trial as alleged, or exceptions must be made in the finding. There is also danger of variance as to details between the specification and the proof. (See par. 158b, infra.)

(*e*) *Specific Articles, When Used.*—When a crime or offense is specifically provided for in an article of war, the charge should regularly be laid under that article and not under the general article, A. W. 96. This rule is particularly to be observed when the crime or offense falls under an article which prescribes a fixed punishment. (See, however, A. W. 37.)

NOTE.—In charging offenses against cadets for violation of regulations of the Military Academy, the offense, if covered by a specific article applicable to cadets, will be laid under that article (G. O. 64, War Dept., 1906); otherwise it will be laid under the general article.

(*f*) *Forms for Charges.*—The forms for charges and specifications set forth in Appendix 6 cover most of the offenses that are tried by military courts and covered in the maximum-punishment order. These forms should be followed, in the cases to which they apply, but they are not mandatory.

(*g*) *Time and Place.*—The allegations of the time and place of the commission of an offense should be stated as accurately as possible, but where the act or acts charged extend over a considerable period of time it may be necessary to cover such period in the allegation. Thus, allegations of "from March to September, 1887", and "from May to October, 1888", have been countenanced in a case in which the accused was charged with the neglect of a duty that required continuous performance. (Digest, p. 486, II, D, 10, *b*.) So, also, it is proper to allege that an offense was committed while "en route" between certain points. (Digest, p. 486, II, D, 9, *b*.) So where the exact time or place of the commission of the offense is not known it is frequently preferable to allege it as having occurred "on or about" a certain date or time, or "at or near" a certain

locality, rather than to aver it as committed on a particular day or between two specified days or at a particular place. There is no defined construction to be placed upon the words "on or about" as used in the allegation of time in a specification. The phrase can not be said to cover any precise number of days or latitude in time. It is ordinarily used in military pleading for the purpose of indicating some period, as nearly as can be ascertained and set forth, at or during which the offenses charged are believed to have been committed—in cases where the exact day can not well be named. And the same is to be said as to the use of the words "at or near" in connection with the averment of place. (Digest, p. 485, II, D, 9, *a*.) If the specification alleges the offense to have been committed "on" a certain date or "at" a certain place, the court in its findings may, by exceptions and substitutions, find another date or place if the evidence supports such amendments, provided the new date or place is sufficiently near the one alleged that an injustice is not done the accused. In preparing several specifications under one charge, the time and place of the alleged offense will be given in each specification.

(*h*) *Christian Name.*—The Christian name of an accused, including his middle name or names, if any, in full, if known (if practicable, as appearing on his service record), will be used in preparing charges. In the case of a person in the military service the name used in the charges should correspond to that borne by the accused on his records or the Army register.

(*i*) *Charging under "Alias."*—If the accused is known by two names, as where a soldier enlists under a name different from that under which he was known in his prior enlistment, both the heading of the charge and the specification will describe him under his true name and also under his assumed name as an alias.

(*j*) *General Prisoners.*—In charging a general prisoner with an offense, the form of the charge will not be changed but the specification will read as follows:

In that General Prisoner A——— B——— did [here allege the offense in the language prescribed when it is committed by an officer or soldier].

It is not necessary to allege in the specification that the general prisoner was formerly a soldier, was tried by a general court-martial, and sentenced to dishonorable discharge and a term of confinement, and that he committed the offense while serving such confinement. The words "general prisoner" necessarily import such facts.

NOTE.—General prisoners are persons sentenced to dismissal or dishonorable discharge and to terms of confinement at military posts or elsewhere.

(*k*) *Change of Grade.*—Where the grade of accused has changed since the commission of an offense, the specification will read as follows:

In that Private A——— B———, Company ———, ——— Infantry, then sergeant, Company ———, ——— Infantry, did, etc.

(*l*) *Written Papers and Oral Statements.*—A specification in alleging the violation of an order which has been given in writing, or of any written obligation—as an oath of allegiance, parole, etc.—should preferably set forth the writing verbatim, or at least state fully its substance, and then clearly specify the act or acts which constitute its alleged violation. Oral statements should be alleged in as nearly the exact words as possible, but should always be qualified by the words "or words to that effect," or some similar expression, since proof will generally vary as to some word or words, particularly if some time has elapsed since the incident. A similar rule obtains in cases involving insubordinate or disrespectful language.

(*m*) *Scandalous and Disgraceful Offenses.*—In framing charges it is permissible, under the custom of the service, after alleging the facts in the specification, to add, "This to the scandal and disgrace of the military service." This form of charge is appropriate in cases of particularly disgraceful conduct committed in the presence of a number of persons, especially civilians, or while the offender was in uniform, or under other circumstances resulting in publicity.

(*n*) *Desertion Followed by Fraudulent Enlistment.*—Enlistment by a soldier in desertion is fraudulent. Such soldier should be charged with desertion under A. W. 58, and with

fraudulent enlistment under A. W. 54. (Cir. 28, War Dept., 1908.) A fraudulent enlistment is no defense to a charge of desertion but is proof of such desertion, for a soldier can not be excused from repudiating a pending contract by substituting another in its place. In such a case the status of desertion remains, notwithstanding the deserter's presence in the military service under a fraudulent enlistment, until he surrenders as a deserter or is apprehended as such. For a single desertion followed by a fraudulent enlistment, but one specification for desertion will be preferred, in addition to the specification for fraudulent enlistment.

NOTE.—A. W. 28 constitutes a rule of evidence and is not a punitive article.

(*o*) *Larceny and Sale of Public Property.*—In cases of larceny of property (not described in A. W. 94) where the accused has sold the stolen property, the charges should not include specifications alleging the sale except where the same has been made to an innocent party and constitutes such a fraud upon the purchaser as to warrant the preferment of a specification based upon such fraud. Proof of a subsequent sale of stolen property goes to show intent to steal, and, therefore, evidence of such sale should be introduced to support charges of larceny, wherever available. Larceny and sale of United States property in violation of A. W. 94 should each be charged in separate specifications, since that article denounces both offenses.

(*p*) *Wording of Statute to be Followed.*—Wherever practicable the exact words of the articles of war will be followed. A person under the influence of intoxicating liquor which incapacitates him mentally or physically for the proper performance of duty is "drunk." Therefore, under A. W. 85 the word "drunk" will be used. So in charging other offenses involving drunkenness no other word or phrase will be used as a substitute for "drunk." Under such charges the court should not in its findings substitute such phrases as "under the influence of intoxicating liquor" and "intoxicating" for "drunk."

SECTION II.

ACTION UPON CHARGES.

75. SUBMISSION OF CHARGES.—**Charges for trial by courts-martial may be preferred by any person subject to military law.**

(A. W. 70.) They will be preferred only when the person preferring them either has personal knowledge of, or has investigated, the matters set forth therein, and from such knowledge or investigation is of the opinion that there is reasonable ground for believing that an offense has been committed, that the accused is guilty of the offense, and that the offense can not be properly or adequately dealt with in any other manner. All charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief. (A. W. 70.)

All charges for trial by courts-martial will be prepared in triplicate, using the prescribed form of charge sheet for each of the three copies. Should the space on the charge sheet be insufficient to accommodate all the charges and specifications proposed, such additional sheets of ordinary paper will be used as may be required. In the preparation of charges care will be taken to observe the provisions of paragraphs 62, 63, 64, 65, 66, and 67, supra. The charges and specifications will be signed as indicated in the form on the prescribed charge sheet (see form, Appendix 5), and the affidavit thereto, in substantially the prescribed form, will be sworn to before any officer, civil or military, authorized to administer oaths (see, as to the competency of military officers to administer oaths, par. 138, infra), and will be forwarded, containing a list of known witnesses both for and against the accused, mentioning where they may be found, and a memorandum of any documentary evidence bearing upon the case which may be obtainable, to the commanding officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains.

NOTE.—The affidavit to the charges must state positively either that (1) the affiant preferring the charges has personal knowledge of the matters set forth therein, or else (2) that he has investigated them and has thus satisfied himself of the facts. It must clearly appear upon which ground he places his statement of the truth of the facts alleged in the charges and specifications. He is not to be permitted to say alternatively, as to any particular specification, that he either has personal knowledge or has investigated. Such an indefinite statement is wholly insufficient to satisfy the requirements of A. W. 70, and will not be accepted.

He may, however, base some of the allegations in a specification, or some of the specifications, on his personal knowledge, and others upon his investigation of the facts. In such cases he will, in the affidavit, state which are based upon personal knowledge, and which upon investigation.

76. Receipt of Charges—Action.—Upon receiving charges preferred for trial by court-martial, a commanding officer will examine them for the purpose of determining whether, on their face—

(*a*) They are (1) signed by a person subject to military law, and (2) under oath, in substantially the prescribed form, either that the person preferring them has personal knowledge of, or else that he has investigated, the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief, as required by the seventieth article of war;

(*b*) That the accused therein named (1) is a person subject to military law and (2) belongs or pertains to his command;

(*c*) That the charges and specifications are substantially in the prescribed forms (see forms, Appendices 5 and 6);

(*d*) That each specification (1) states an offense cognizable by a court-martial and (2) is laid under the appropriate article of war; and

(*e*) That the specifications and charges are drawn in substantial conformity with the requirements of paragraph 74, supra.

In case the charges do not appear, on their face, to be signed by a person subject to military law, or if they are not properly signed and sworn to, or are not in proper form, or appear to be defective or irregular in any other way, the commanding officer may return them for correction, or consideration, and may permit them to be withdrawn or amended, or new or additional charges or specifications to be preferred. In case the accused does not belong or pertain to his command, the commanding officer may either return the charges, or transmit them through channels to the commanding officer immediately exercising summary court-martial jurisdiction over the command to which the accused be-

longs or pertains, or may take such other proper action as circumstances may require, or superior authority may direct.

76a. Investigation of Charges.—If the charges and specifications (1) appear to be in proper form, and (2) properly to allege one or more offenses cognizable by a court-martial, against an accused, who is (3) a person subject to military law, and (4) belongs or pertains to his command, the commanding officer so receiving them will proceed as follows:

1. If the accused is not an officer, and it appears to the commanding officer that the charges are trivial or inconsequential, he may disregard them; otherwise,
2. He will consider whether the case presented is one which he can properly dispose of under the one hundred and fourth article of war; and, if so, he will so dispose of it. (See par. 336a, infra.) Otherwise, he will investigate it, as follows:
3. He will cause the person preferring the charges, together with all available witnesses mentioned in the memorandum in the charges, and also the accused, and any available witnesses desired by the accused, and any other available witnesses of whom he may learn, to appear before him at a stated time (to be fixed either by standing orders or otherwise), at his office or headquarters, or other available place, within the next twenty-four hours (except in the case of an intervening Sunday or holiday, and then within the next succeeding 24 hours thereafter), with all available documentary evidence, including the service record of the accused, and will there informally investigate the charges, substantially in the same manner as upon a hearing before a summary court. The witnesses (except the accused) will be sworn, but no record will be made of the testimony, and no counsel will ordinarily appear either for the accused or for the prosecution (although in exceptional cases an available defense counsel of a general or special court-martial, or other counsel, may be permitted by the commanding officer, in

his discretion, to appear for the accused, and a trial judge advocate of a general or special court-martial, or other officer, for the prosecution). At such investigation full opportunity will be given to the accused to cross-examine the witnesses whose statements are unfavorable to him, and to present anything he may desire in his own behalf, either in defense or mitigation; and all available witnesses requested by the accused will be called and examined. The commanding officer will, before receiving any statement by the accused, carefully warn him that it is not necessary for him to make any statement with reference to the charges against him, but that, if he does make one, it may be used against him. (See par. 225b, infra.)

NOTE.—If exigent circumstances make it impracticable for the commanding officer to conduct any particular investigation himself, he may order it to be made by the second in command, or by such other officer as he may designate on account of rank, experience, and attainments.

4. If, and whenever, upon such investigation, it appears to the commanding officer that the charges can properly be disposed of by him under the one hundred and fourth article of war, he will so dispose of them.
5. If, and whenever in the course of such informal investigation, it appears to him that the charges can not properly be disposed of under the one hundred and fourth article of war, but are within the jurisdiction of a summary court-martial within his command, and can properly be disposed of by trial by such court, and that there is probable cause for trial, he will thereupon immediately, without further investigation, refer the charges to a summary court-martial for trial.
6. If, upon such informal investigation, it appears to the commanding officer that there is no substantial evidence tending to show that an offense has been committed, or no substantial evidence tending to

show that the accused is guilty of the offense charged, he (unless the accused is an officer, and such commanding officer is not himself the officer exercising general court-martial jurisdiction over the command) will dismiss the charges; but if, in any case, he finds there is substantial evidence tending to show that the accused (whether or not probably guilty of the offense, or some of the offenses charged) is guilty of some other offense or offenses, he may permit new or additional or amended charges to be preferred (or may himself prefer them), and proceed as if such new or additional or amended charges had been among the ones originally before him.

7. If either

(a) The accused is an officer, and, upon such informal investigation, the commanding officer is of opinion (1) that the charges are not such as can be disposed of under the one hundred and fourth article of war and (2) that trial by a general court-martial will probably be necessary;

or

(b) The accused is any person subject to military law other than an officer, and upon such informal investigation the commanding officer is of opinion that (1) an offense has been committed, and that (2) there is substantial evidence tending to show that the accused is probably guilty, and that (3) the charges are not such as can be disposed of under the one hundred and fourth article of war, or (4) by trial before a summary court-martial within his command, and that (5) trial by special or general court-martial will probably be necessary;

he will either himself proceed with the investigation either then or at such other convenient time and place as he may determine, or else he will refer

the charges for further investigation to the summary court officer of the command, or to some other officer (other than the officer, if any, preferring the charges) whose rank, experience, and qualifications are such as to fit him for the performance of this important judicial duty.

NOTE.—If such commanding officer is himself the officer exercising general court-martial jurisdiction over the command, he will proceed in case the accused is an officer, in the same way as if the accused were not an officer. No authority inferior to the officer exercising general court-martial jurisdiction over the command will dismiss properly drawn charges against an officer, except upon disposing of them by punishment under the 104th Article of War.

8. The officer so proceeding with the investigation (whether the commanding officer himself or another officer) will examine all available witnesses and documentary evidence in the same manner hereinbefore directed in clause No. 3 of this paragraph, except that he will, upon such examination, reduce the material testimony given by each witness, on direct examination and on cross-examination, to a clear, succinct statement or summary (for form, see Appendix 18), which, in the presence of the accused, will be read over to the witness and signed and sworn to by him. When it is not practicable to obtain personal testimony from any distant witness, whose testimony is deemed material, either for the prosecution or for the defense, a signed written statement from such witness will be obtained by the investigating officer, if practicable, of the testimony which the witness would give if present, and will be shown to the accused, and included with the summaries of the testimony of the witnesses examined in person, among the documents returned with the report of the investigation. Any available papers or documents which may serve to throw light on the case will be likewise shown to the accused,

and returned with the report of the investigation. Any statement made by the accused will likewise be reduced to writing, and will be read over to him, and he will be offered an opportunity to sign it, if he so desires, but he will not be required to do so, and will be advised that it is not necessary for him to do so. Care will be taken to insure that the accused is fully advised of the nature of the offense, or offenses, charged against him, and of all his legal rights in the premises.

An officer charged with the important duty of investigating charges for trial by court-martial will maintain throughout the investigation an attitude of judicial fairness, the object of his investigation being to prevent unjust or unnecessary trials quite as much as to establish the existence of facts upon which the accused may properly be brought to trial.

9. If the commanding officer shall determine, in accordance with the provisions of clause 7, supra, of this paragraph, either to proceed further with the investigation himself or to refer the charges for further investigation, he will cause the accused, in any case where he finds indications of mental defect, derangement, or abnormality, to be brought before a medical officer (who should be a psychiatrist, if one be reasonably available) for examination as to his mental condition, such examination to concern itself solely with the mental capacity and condition of the accused, with a view to learning whether he suffers from any mental defect or derangement marking him as either temporarily or permanently abnormal or peculiar from the medical point of view. In such medical examination no attempt will be made to define his legal responsibility for crime or to apply any legal tests or definitions, but the examination will be directed solely to ascertain whether in his mental condition

there is any feature of abnormality which renders him not susceptible to ordinary human motives or appreciations of right or wrong, or to the normal control of his actions, and as to whether he is capable of conducting his defense intelligently. The medical examiner should, however, endeavor to ascertain, and should consider and weigh, the accused's mental condition at the time of the act charged, as well as at the time of such examination. The medical officer will report the result of such examination to the investigating officer in writing, stating his opinion as to the subjects to be considered by him as hereinbefore prescribed, and giving his reasons for his opinions and conclusions; and, if he is of opinion that there is substantial reason to doubt the accused's mental normality and considers that a further inquiry into his history is desirable, he may so recommend. His report will be inclosed by the investigating officer, with the other papers in the case.

10. The investigating officer will, if practicable, complete the investigation within 24 hours, or else as promptly as circumstances will permit, and (if he is not himself the commanding officer) will submit his report in writing to the authority appointing him, inclosing the summaries of the testimony of the witnesses and all the papers mentioned in any of the foregoing clauses of this paragraph, and recommending the disposition which he believes should be made of the case. His report will be in the form of an original communication, carrying the other documents mentioned as inclosures thereto, and will not be made as an indorsement on the charges, on which no indorsement will be made. The report will also include a reference to any known document or other matter of evidence not inclosed, but which it is believed may become important or necessary in the case, and will also include a statement of all explanatory or extenu-

ating circumstances which shall have come to the attention of the investigating officer.

NOTE 1.—When the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains is the officer preferring the charges, he will cause them to be investigated by some officer other than himself before reaching a decision as to their disposition; except (1) in the case of new or amended or additional charges preferred by him as a result of an investigation conducted by him or under his direction, or (2) where he decides to dispose of them under the one hundred and fourth article of war or to refer them for trial to a summary court-martial within his jurisdiction; or that (3) when the officer preferring the charges is the only officer with the command and is of the opinion that the case is one for special or general court-martial he may himself investigate the charges and make the prescribed report.

NOTE 2.—The report of the investigation, summaries of the testimony of the witnesses, report, if any, of the medical officer, and all other papers prepared in connection therewith and indorsements thereon, will be upon paper of legal-cap size; and, if in typewriting, will be prepared in triplicate. If in longhand, only originals will be prepared, without copies, and in case of ultimate reference to a special or general court-martial for trial, two copies will be prepared at the headquarters at which the reference for trial is ordered.

NOTE 3.—Bulky reports or official documents will not ordinarily be appended or copied, but listed, and the place where they may be found stated in the report.

11. From this investigation the commanding officer will decide what disposition is to be made of the charges, and will either (1) dismiss them (unless the accused is an officer and the commanding officer is not himself the officer exercising general court-martial jurisdiction over the command), (2) dispose of them under the one hundred and fourth article of war, (3) refer them for trial to a sum-

mary court-martial within his jurisdiction, or (4) forward them for action by superior authority (unless he himself has power to convene a special court-martial or a general court-martial, in which case he will consider and dispose of them as hereinafter prescribed in the next succeeding clause of this paragraph and in par. 78, infra). Unless such commanding officer is the accuser or prosecutor of the person to be tried (or unless the accused is an officer), he will not ordinarily forward charges to superior authority, except in cases where he desires to recommend trial by a court-martial not within his competency to appoint; all other cases he should dispose of without reference to higher authority. Action forwarding the charges to superior authority will be in the form of an indorsement on the report of the investigating officer, forwarding the report with all accompanying papers, and inclosing the charges, with his recommendations as to the disposition thereof, and with a statement of any explanatory or extenuating circumstances which may have come to his attention (except that, in case the commanding officer has himself completed the investigation, such communication to superior authority will be in the form of an original communication embodying his report of the investigation, with his recommendations and statement of any explanatory or extenuating circumstances, and inclosing the summaries of the testimony of the witnesses and the other papers and documents and the report, if any, of the medical officer, as hereinbefore prescribed for the report of the investigating officer, and also inclosing the charges), and inclosing any available evidence of any previous convictions of the accused proper to be considered under paragraphs 306 and 307, infra, in conformity with the requirements of paragraph 306.

12. Each commanding officer superior to the one immediately exercising summary court-martial jurisdic-

tion over the accused, into whose hands charges may officially come, will either dismiss them, dispose of them under the one hundred and fourth article of war, refer them for trial to a court-martial within his jurisdiction, or forward them to the next superior authority exercising court-martial jurisdiction over the command to which the accused belongs or pertains, as the circumstances may appear to require. (See par. 78, infra.)

NOTE.—A. W. 70, as amended by the code of 1920, provides (a) "No charge will be referred for trial until after a thorough and impartial investigation thereof shall have been made"; and (b) "Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief."

Taking these two statutory provisions together, they prohibit (1) reference of any charges for trial without prior investigation (which will be conducted in accordance with the provisions of the preceding paragraph to which this note is appended), and (2) any commanding officer from directing charges to be preferred against any person, since he can not properly direct anyone to make the oath to the charges required by the statute. He may, however, of course, direct that any facts or the conduct of any person be looked into with a view to determining whether grounds exist for preferring charges.

76b. Further Investigation of General Court-Martial Charges.—Before directing trial of any charge by general court-martial or military commission, the convening authority will refer it to his staff judge advocate for consideration and advice. (A. W. 70.) Should the investigation of the charges appear not to be complete and satisfactory, the charges may be returned for further investigation, to be conducted, reported, considered, and acted upon in like manner as the original investigation; or, in a proper case, the necessary further investigation may, when practicable, be conducted in like manner by the staff judge advocate, an inspector, or other suitable officer. Should any charge or specification appear to be improperly drawn, the staff judge advocate may secure its correction or the substitution of another through direct correspondence or personal interview. The staff judge advocate may, over the signature of the

person preferring the charges, and without any new oath thereto, make corrections in the phraseology of any charge or specification, by addition, substitution, or elimination, whenever such correction does not change the substantive character of the charge or specification, as preferred by the person signing it. He may also properly advise that new or substituted specifications and charges, based upon the indicated competent evidence, be preferred. When the charges are returned by the staff judge advocate to the convening authority he will in writing over his signature (or over the signature of an assistant staff judge advocate, with an indication of approval or disapproval and any further comment or recommendations, signed by the staff judge advocate) advise the latter (1) whether or not they are correct and complete in form, and (2) appropriate to the indicated competent evidence in the case; (3) whether or not, in his opinion, a prima facie case, justifying trial or other proceedings, exists; (4) whether each specification states an offense cognizable by court-martial; (5) whether the indicated competent evidence justifies trial on each of the several specifications and charges, and, if not on all, then on which ones; (6) whether any, and if so what part, of the evidence, contained in the summaries of the statements of the witnesses or documents or other evidence submitted is incompetent or improper to be introduced as evidence at the trial for any reason; (7) whether, in view of the report, if any, of the medical officer to the investigating officer, or on any other grounds, there is reason to believe that the accused may be mentally defective or deranged, either temporarily or permanently; (8) the age of the accused; and will recommend the disposition which he believes should be made of the case, including particularly whether it should be:

1. Dismissed without trial or further proceedings;
2. Disposed of under the one hundred and fourth article of war;
3. Referred for trial to a summary court-martial;
4. Referred for trial to a special court-martial (either under the second proviso to A. W. 12, or otherwise);
5. Referred for trial to a general court-martial (or to a military commission);

6. Disposed of by taking proper steps looking to the discharge of the accused, if an enlisted man, under the provisions of Army Regulations, in case of indicated mental defect or derangement, or in other proper cases; or if the accused be an officer or person subject to military law other than a soldier, by taking proper steps looking to his dismissal, dropping from the rolls, or other proper procedure; and also
7. Whether a medical board should be convened under the provisions of paragraph 76c; and
8. Whether the charges should be retained for further investigation, or pending the recovery of the accused from illness or from temporary mental derangement, or for any other purpose; or
9. The accused should be surrendered for trial to the civil authorities, or the case disposed of in any other manner than in one of the ways above mentioned; and
10. In case he recommends separation of the accused from the service without trial, on account of indicated mental defect or derangement, whether (and if so, what) relatives or civil authorities should be advised.

He will also submit a form of order designed to carry his recommendations into effect.

76c. Appointment of Medical Board by Convening Authority.—Before directing the trial of any charge by general court-martial or military commission the convening authority may, in his discretion, either before or after receiving the advice of his staff judge advocate upon the charges, cause a medical board to be convened to examine the accused, and will do so in every case where it appears to him, either in view of the report, if any, of the medical officer under paragraph 76a, supra, or on any other grounds, that there is reason to believe that the accused may be mentally defective or deranged, either temporarily or permanently. Such medical board will consist of such number of medical officers, not less than three, as the convening authority may see fit, at least one of whom should, if practicable, be a psychiatrist or expert in mental diseases. There is no legal objection

to the appointment as a member of such board of the medical officer or psychiatrist, if any, who examined the accused under the provisions of paragraph 76a, supra. Such board will proceed as promptly as practicable to examine the accused, and will take the accused under its personal observation for such reasonable length of time as may be necessary. It will take into consideration the report, if any, of the medical officer under paragraph 76a, supra, and any other available information bearing upon the purposes of the investigation, and may in case of doubt extend the examination to written inquiries directed to probation officers, physicians, clergymen, school and prison authorities, mayors, postmasters, etc., as well as to relatives and friends of the accused, for the purpose of developing from any sources which it deems trustworthy any information that may aid it in its investigation. Their examination and investigation will be directed to, and concern itself solely with, the same matter as an examination by a medical officer under paragraph 76a, supra, viz, the determination of the mental capacity and condition of the accused, with a view to learning whether he suffers from any mental defect or derangement marking him as either temporarily or permanently abnormal or peculiar from the medical point of view. The board will make no attempt to define or determine the legal responsibility of the accused for crime, or to apply any legal tests or definitions; but the examination will be directed solely (like that of an examination by a medical officer under par. 76a, supra) to ascertaining whether in the accused's mental condition there is any feature of abnormality which renders him not susceptible to ordinary human motives or appreciations of right or wrong, or to the normal control of his actions, and as to whether he is capable of conducting his defense intelligently. The board will, however, endeavor to ascertain, and will consider and weigh the accused's mental condition at the time of the offense charged, as well as at the time of the board's examination.

The medical board will make a written circumstantial report of its examination and investigation to the convening authority, appending thereto all such written evidence and documents as it may have considered. Such report will state its opinion as a board, or individually if there is any difference of opinion, as to the subjects to be considered by it as hereinbefore prescribed,

and giving its reasons for its opinions and conclusions, and stating its conclusions as to the mental condition of the accused at the time of the act charged and at the time of its examination of him, with reference to any form of mental derangement, defect, or other mental abnormality; but will not attempt to determine the accused's legal responsibility nor to apply any legal definition of insanity or the like, the members confining themselves to the facts of the accused's mental condition as viewed by them as medical men. The report should include in its description of the accused's mental condition (both as to the time of the alleged commission of the offense and as to the time of their examination of the accused) an opinion as to whether he lacked the ordinary understanding of right and wrong and whether he lacked the ordinary capacity to control himself from wrong actions.

It should also specifically express an opinion as to whether or not he is capable of conducting his defense intelligently; on this point the inquiry relates particularly to the time of trial and should consider whether the accused is mentally capable of communicating intelligently with his counsel, of understanding the nature of the proceedings, and of doing the things necessary for an adequate presentation of his defense.

If the opinion or report, or any material part thereof, is founded upon information received by correspondence or interviews, with third persons, the report will specifically so state, noting briefly the data so obtained, and will mention the persons giving such material information, with their names and addresses, so that the convening authority as well as (in case of ultimate reference of the charges for trial) both the trial judge advocate and the accused and his counsel may be informed thereof, to enable them to make further inquiries and to summon such persons for examination at the trial if desired.

The convening authority upon the receipt of the report of the medical board will refer it to his staff judge advocate for consideration and advice in connection with the other papers in the case, and may in cases where mental defect or derangement of the accused, either temporary or permanent, is indicated, and where, except for such indication, reference of the charges for trial would be proper, take action as follows, as he may determine:

1. If he concludes that the accused is at the time not capable of conducting his defense intelligently, but that after a reasonable lapse of time the accused will become capable of so doing, he may direct that further action on the charges be suspended for the time being, pending such further action as he may afterwards determine.
2. If he concludes that the accused, whether or not at the time capable of conducting his defense intelligently, is a person of such mental abnormality that the purposes of justice and discipline will not be well served by his trial and punishment, and that his further continuance in the military service will be detrimental to the service, he may properly direct that further action on the charges be suspended and that proper steps be taken looking to the discharge or retirement of the accused or his commitment to St. Elizabeths Hospital, or take such other steps as may be appropriate.
3. If he concludes that the accused, whether or not capable of conducting his defense intelligently, was at the time of the offense charged in such an abnormal mental condition that there is no probable ground for finding him guilty, by reason of probable lack of criminal intent as defined in subparagraph (g) of paragraph 219, infra, he may properly direct that the charges be dismissed, and should take such further steps, if any, as the facts may suggest.
4. If he refers the charges for trial he will cause the report of the medical board and one copy thereof to be sent to the trial judge advocate with the charges and the other accompanying papers. (See par. 219, infra.)

NOTE.—In case the accused is, without trial, discharged under Army Regulations or otherwise separated from the service or retired because of indicated mental defect or mental derangement, The Adjutant General will so notify such person's relatives and any other proper local civilian authorities with a view to enabling measures to be taken, if desired, for the proper care of such person and the protection of the public. To that end, a conven-

ing authority directing proceedings taken with a view to the separation from the service without trial of an accused person because of such indicated mental defect or derangement will so advise The Adjutant General, giving any available information as to the relatives of the accused and as to local civilian officers who should properly be so notified.

77a. Prompt Action Required.—When any person subject to military law is placed in arrest or confinement, immediate steps will be taken to try the person accused or to dismiss the charges and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct. (A. W. 70.) If a person held for trial by a general court-martial is placed in arrest or confinement, the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable he will report to superior authority the reasons for delay.

NOTE.—The provision of the law making any officer who is responsible for unnecessary delay in investigating or carrying a case to final conclusion punishable at the discretion of a court-martial (A. W. 70) was introduced by the code of 1920.

77b. Service of Charges and Other Papers on Accused.—The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, together with the order of reference for trial and the report of the investigating officer, with the summaries of the testimony of the witnesses and any exhibits thereto, and the report, if any, of the medical officer on the preliminary examination, and, all other inclosures and indorsements thereon, including the report of the staff judge advocate and the report, if any, of the medical board under paragraph 76c, supra. A failure so to serve such charges will be ground for continuance unless the trial be had on charges theretofore otherwise officially furnished the accused. (A. W. 70.)

78. Determination of Proper Trial Court.—When an officer who exercises court-martial jurisdiction receives charges against any person subject to military law, or triable before a military tribunal under the law of war, it is his duty

to consider whether such trial should be by summary, special, or general court-martial, or other military tribunal. Subject to jurisdictional limitations, he should not withhold charges from trial by special or summary court solely for the reason that the maximum limit of punishment is beyond the jurisdiction of such courts to impose. An officer competent to appoint a general court-martial may, when in his judgment the interests of the service shall so require, cause any particular case to be tried by a special court-martial notwithstanding the limitations upon the jurisdiction of the special court-martial as to offenses set out in A. W. 13; except that the limitations upon jurisdiction as to persons and upon punishing power set out in A. W. 13 must be observed. (A. W. 12.) On the other hand, he should not refer to a special or summary court offenses which, by reason of their inherent gravity, or of the circumstances surrounding their commission, merit greater formality of trial or more condign punishment than is found in the procedure or jurisdiction of such courts. As a general rule no case should be tried by a special or general court-martial in which, under the apparent circumstances of the case, adequate punishment can be imposed by a summary court-martial; and no case should be tried by a general court-martial in which, under the apparent circumstances of the case, including the previous military record of the accused, adequate punishment can be imposed by a summary or special court-martial. Beyond this no fixed rule can be laid down and the matter must be decided after careful consideration by commanding officers, with the benefit of the advice of their staff judge advocates.

79. Disposition of Copies of Charges.—(*a*) When trial is to be had by summary court martial the original charge sheet (see par. 75, supra), will be completed as the record of trial. This record will be delivered to the adjutant who will, after noting the necessary data on the pay card of the accused, initial it in the place provided and transmit it to the company or other commander, who will, after making the necessary entries on the service record, initial and return it to the commanding officer who appointed the court, in whose office it will be carefully preserved. A certified copy thereof will

be forwarded to The Adjutant General of the Army by the adjutant with the memorandum of transmittal of reports of changes for the day upon which the sentence was approved, for file with the record of the accused. The remaining copy duly certified will, with the least practicable delay, be transmitted as the required report of trial to the officer exercising general court-martial jurisdiction over the command, there to be filed in the office of the staff judge advocate until the statistical information required for the annual report of the staff judge advocate has been secured, when it may be destroyed.

(*b*) When trial is to be had by special or general court-martial the charges with the order of reference for trial indorsed thereon, together with the report of the investigating officer with the summaries of the testimony of the witnesses and the report, if any, of the medical officer on the preliminary examination and all other inclosures, and indorsements thereon, including the report of the staff judge advocate, and the report, if any, of the medical board under paragraph 76c, supra, and one copy of such charges and of such order of reference and of all such other papers and documents will be referred to the trial judge advocate direct, the copy to be furnished by him to the accused (see par. 77b); and the other copy will be used for record purposes in the office of the officer appointing the court. The originals will be returned by the trial judge advocate with the record of the trial to the officer appointing the court, and in the case of a general court-martial will be forwarded with the record of trial to the Judge Advocate General.

80. Service of Charges upon Accused.—In order that the accused may have sufficient time to prepare for his defense it is provided by A. W. 70 that in time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him. (See par. 79b, supra.)

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Section I.

THE MEMBERS.

81. Place of Meeting—Duties of Members.—The authority appointing a general or special court-martial designates the place for holding the court, hour of meeting, the members of the court, including the law member for every general court-martial (A. W. 8), the trial judge advocate and his assistants, if any, and the defense counsel and his assistants, if any. A general or special court-martial assembles at its first session in accordance with the order convening it; thereafter, according to adjournment. Courts will be assembled at posts or stations where trial will be attended with the least expense. A member stationed at the place where the court sits is liable to duty with his command during adjournment from day to day. Subject to any instructions that may be given by the authority that appoints the court, the court will determine the hours of holding its sessions.

81a. Appointment of Law Member for General Courts-Martial.—The authority appointing a general court-martial shall

detail as one of the members thereof a law member, who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as especially qualified to perform the duties of law member.

NOTE.—For the duties of a law member of the court, see infra, paragraph 89a, "Duties of the Law Member."

As to his rank, see supra, paragraph 12 (c).

82. Uniform.—For regulations regarding uniform to be worn by members of courts-martial, the trial judge advocate, the assistant trial judge advocates, the defense counsel, the assistant defense counsel, the accused, and witnesses, see Regulations for the Uniform of the United States Army. In any case of doubt (as where the court consists of members but recently mustered into the service), the president of the court will designate the uniform in the notice sent to members, trial judge advocate, and defense counsel, and to their assistants, if any, notifying them of the place and hour of meeting of the first session.

83. Seating of Court.—When the court is ready to proceed it is called to order by the president. Members will be seated according to rank, alternately to the right and left of the president; except that the law member of a general court-martial (if he is not the president nor the next ranking member) will be seated next to the president, on the left. The trial judge advocate, the defense counsel, the assistant trial judge advocates, and the assistant defense counsel, the accused, and his counsel, are seated so as to be most easily seen and heard by all the members of the court. The reporter should be seated near the trial judge advocate.

84. Roll Call.—At the beginning of each session the trial judge advocate notes in the record the presence or absence of the members of the court, of the trial judge advocate and assistant trial judge advocates, the defense counsel and assistant defense counsel, the accused and any other counsel for the accused upon calling their names or by informally noting the presence or absence of each of them. (See Appendices 10

and 11, forms of record of general and special courts-martial.) When the accused appears before the court for the first time the trial judge advocate will announce his name to the court, and also whether he has any counsel besides the defense counsel and assistant defense counsel of the court, and, if so, the names of such other counsel.

NOTE.—For number necessary to constitute a quorum of a general or special court-martial and the procedure to be taken when the number is reduced below 5, see paragraph 7.

85. ABSENCE OF MEMBER.—A member of a court-martial who knows, or has reason to believe, that he will, for a proper reason, be absent from a session of the court, will inform the trial judge advocate accordingly. When a member of a court-martial is absent from a session thereof the trial judge advocate will cause that fact, together with the reason for such absence, if known, to be shown in the record of proceedings. If the reason for such absence is not known, or disclosed at the trial, the trial judge advocate will cause the record to show the member as absent, cause unknown. In any event, the appointing authority will take such action, if any, relative to such absence as he may deem proper.

85a. Absence of Law Member.—In case of the absence of the law member of a general court-martial from, or at any time during, the trial of a case which has been directed to be tried with the law member present, or at a portion of the trial of which the law member has been present, the court will take a recess, or if necessary continue the hearing until the law member or another law member is present, or until directed by the convening authority to proceed without the presence of a law member, and in case of continuance, will report the facts to the convening authority.

86. DECORUM TO BE OBSERVED.—Trials before courts-martial will be conducted with the decorum observed in civil courts. The conduct of members should accordingly be dignified and attentive. Reading of newspapers or other evidence of inattention by members of a court-martial during its sessions constitutes a neglect of duty to the prejudice of good order and military discipline. It is the duty of the president of the court to admonish against such inattention, and charges may be preferred against a member who does

not heed the admonition. A court-martial has no power to punish its members, but a member is liable to charges and trial for improper conduct as for any other offense against military discipline. Improper words used by a member should be taken down in writing and any disorderly conduct reported to the appointing authority. During the reading of the order appointing the court and the arraignment the trial judge advocate and his assistants, the defense counsel and his assistants, the accused and his counsel, will stand; while the court and the trial judge advocate and his assistants are being sworn all persons concerned with the trial, including any spectators present, will stand; when the reporter, an interpreter, or a witness is being sworn, he and the trial judge advocate will stand; and when the trial judge advocate, the defense counsel, the accused or his counsel addresses the court, he will rise. (For punishment for contempts, see Chapter X, Section I, par. 173.)

87. Control of Court over Accused.—A court-martial has no control over the nature of the arrest or other status of restraint of a prisoner except as regards his personal freedom in its presence. For the relation between a court-martial and the accused during trial, as regards arrest, see Chapter V, Section I, particularly par. 47 (c).

88. Accused Not to be Tried in Irons.—The accused should not be brought before the court in irons, unless there are good reasons to believe that he will attempt to escape or to conduct himself in a violent manner, but the fact that a prisoner has been tried in irons can not in any case affect the validity of the proceedings.

89. Duties of the President.—A president of the court will not be announced. The officer senior in rank present will act as such. The president does not, by virtue of being such, exercise command of any kind. He is in no sense the commanding officer of the court, and can not by virtue of being president give an order to a member. As the organ of the court he gives the directions necessary to the regular and proper conduct of the proceedings; but a failure to comply with a direction given by him, while it may constitute a neglect to the prejudice of good order and military dis-

cipline, can not properly be charged as a violation of the sixty-fourth article of war. (Digest, p. 508, VI, G, 3.) Neither the court nor the president is authorized to place the trial judge advocate or the defense counsel in arrest. Only the proper commanding officer can impose arrest. It is the duty of the commanding officer to secure the attendance of the accused before the court. (Digest, p. 509, VII, C, 2; id., VII, C, 3.) The president is the presiding officer of the court, and as such is the organ of the court to maintain order and conduct its business. In addition, he has the duties and privileges of other members. He has an equal vote with other members in deciding all questions submitted to a vote or ballot of the court, including challenges, findings, sentence, acquittal, and any interlocutory question submitted to the vote of the court pursuant to the objection of any member to a ruling of the president or of the law member under A. W. 31. He speaks and acts for the court in every instance where a rule of action has been prescribed by law, regulations, or its own resolution. He administers the oath to the trial judge advocate, and authenticates by his signature all acts, orders, and proceedings of the court requiring it. (See Winthrop, p. 249.) It is his duty to take proper steps to insure prompt trial and disposition of all charges referred for trial and to keep the court advised thereof.

Ruling Upon Interlocutory Questions.—The president of a general court-martial in the absence of the law member of the court, and the president of a special court-martial in all cases, will rule in open court upon all interlocutory questions, other than challenges, arising during the proceedings. (A. W. 31.) Under this authority, conferred upon him by the thirty-first article of war as amended by the code of 1920, he will open and close the court (subject to any directions relating thereto given by vote of the court), and will in open court, without closing the court, rule upon and determine all interlocutory questions of every kind (other than challenges) arising during the proceedings, including questions of the admissibility of evidence, the competency of witnesses, continuances, adjournments, recesses of the court, motions, and other questions, and methods of procedure, such as the order of the introduction of witnesses or other evidence, the

recall of witnesses for further examination, whether expert witnesses shall be admitted or called upon any question, whether the court shall view the premises where an offense is alleged to have been committed, and as to the competency of children as witnesses, or of witnesses alleged to be mentally incompetent, or whether the existence of mental disease or mental derangement on the part of the accused has become an issue in the trial, whether the accused shall be required to submit to physical examination, whether any argument or statement of counsel for the accused or of the trial judge advocate is improper, and all other questions of every kind (except upon challenges, and the findings and sentence of the court); provided, however, that if any member object to any ruling of the president upon any question of any kind arising during the trial or proceedings, the court shall be cleared and closed and the question decided by a majority vote, viva voce, beginning with the junior in rank. (A. W. 31.)

89a. Duties of the Law Member of a General Court-Martial.—(1) The law member of a general court-martial, whenever present, will, instead of the president, rule in open court on all interlocutory questions other than challenges arising during the proceedings. (A. W. 31.) His ruling will be addressed to the president of the court, and will take the form of a statement of his opinion and his recommendations. (See form, Appendix 9.) The law member will so rule upon all questions arising during the proceedings, except (1) upon challenges, (2) on the findings, and (3) on the sentence.

(2) On any question arising on any objection to the admissibility of evidence offered during the trial, such ruling of the law member is, by the thirty-first article of war, made the decision of the court upon the question, and will be so announced by the president.

(3) Upon any other interlocutory question arising during the proceedings, such ruling of the law member will be accepted and announced by the president as the decision of the court, unless either the president or any other member of the court objects to the ruling, in which case the court will be cleared and closed and the question decided by a majority vote, viva voce, beginning with the junior in rank. (A. W. 31.)

(4) The phrase "objection to the admissibility of evidence offered during the trial," as used in A. W. 31 and in this paragraph of this Manual, will not be construed to include any questions as to—

(a) The order of the introduction of witnesses or other evidence (including calling of witnesses on behalf of the court).

(b) Recalling witnesses for further examination.

(c) Whether expert witnesses shall be admitted or called upon any question.

(d) Whether the court shall view the premises where an offense is alleged to have been committed.

(e) As to the competency of witnesses; as for instance, of children, or witnesses alleged to be mentally incompetent, and the like.

(f) As to insanity of the accused.

(g) Whether the existence of mental disease or mental derangement on the part of the accused has become an issue in the trial.

(h) Whether the accused shall be required to submit to physical examination.

(i) Whether any argument or statement of counsel for the accused, or of the trial judge advocate, is improper.

(j) Any ruling in a case involving military strategy or tactics or correct military action.

Upon all these questions arising at the trial, if any member object to any ruling of the law member, the court will be cleared and closed and the question decided by a majority vote of the members, viva voce, beginning with the junior in rank. (A. W. 31.)

(5) The phrase "interlocutory questions," as used in the thirty-first article of war and in this paragraph, will be deemed to include all questions of any kind arising at any time during the trial or proceedings while the court is convened in open or closed session, except the action of the court on challenges, on the findings, and on the sentence. (A. W. 31.)

(6) In addition, the law member has the duties and privileges of other members of the court. He has an equal vote with other

members in deciding all questions submitted to a vote or ballot of the court, including challenges, findings, sentence, acquittal, and any interlocutory questions submitted to a vote of the court pursuant to the objection of any member to a ruling of the law member under A. W. 31.

(7) The law member of a general court-martial, when present, will (instead of the president) make the explanation to the accused of the effect of a plea of guilty required by paragraph 154 (d), infra, and will advise the accused of his right to testify or make a statement as required by paragraph 215, infra, and, in a proper case, advise the accused of his right to plead the statute of limitations, as required by paragraph 149 (h), infra.

He may, like any other member of the court, put questions to the witnesses which appear necessary or desirable to elucidate the truth. (See as to questions by members of the court, par. 253a, infra.)

NOTE 1.—Whenever upon the objection of a member to a ruling of the law member the court is cleared and closed and proceeds to vote upon a question under the provisions of A. W. 31, the members, in voting upon the question, will bear in mind that while the court as a whole are responsible for the legality of their decisions, they should ordinarily be guided by the opinion of the law member upon any point of law or procedure, and should not overrule it except for very weighty reasons, nor without considering the grave consequences which may result from a disregard of his advice on any legal point. The court in sustaining the opinion of the law member on any question may enter in the record that they have so decided in consequence of that opinion.

90. Method of Voting.—(a) On voting upon any interlocutory question other than challenges arising during the proceedings the members of the court shall vote, viva voce, beginning with the junior in rank, and the question shall be decided by majority vote; a tie vote on any objection or motion is a vote in the negative. The objection or motion is not sustained. (b) Voting by members of a general or special court-martial upon questions of challenge, on the findings, and on the sentence, shall be by secret written ballot. (A. W. 31.) The junior member of the court shall in each case count the votes, which count shall be checked by the president, who will forthwith announce the result of the ballot to the members of the court. A tie vote on a challenge is a vote in the negative; the challenge is

not sustained. When the offense charged includes a minor offense, voting shall first be had upon the major offense. In all deliberations, including those on challenges, findings, sentence, acquittal, and adjournments, the law secures the absolute equality of the members, neither the president nor the law member having any greater rights in such matters than any other member (although, as already stated [see par. 89a, supra], the other members should not disregard the opinion of the law member of a general court-martial on a legal question arising in the trial, except for very weighty reasons).

90a. Number of Votes Required—Death Sentence—When Lawful.—No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court-martial present at the time the vote is taken, and for an offense expressly made punishable by death by the articles of war. No person shall be sentenced to life imprisonment, nor to confinement for more than 10 years, except by the concurrence of three-fourths of all of the members of the court present at the time the vote is taken. All other convictions and sentences, whether by general or special court-martial, may be determined by a two-thirds vote of those members of the court present at the time the vote is taken. All other questions shall be determined by a majority vote.

Refusal to vote on any question arising during the proceedings constitutes a neglect to the prejudice of good order and military discipline punishable under A. W. 96. For voting on findings and sentence, see Chapter XII, Section II.

91. Closed Sessions.—(a) Members take an oath not to disclose or discover the vote or opinion of any particular member of the court-martial upon a challenge or upon the findings or sentence. (See A. W. 19.) In order to avoid disclosing or discovering such vote or opinion the court is closed while voting upon such questions. When the court is closed all persons (including the trial judge advocate) withdraw. In important cases, where delay would ensue due to the number of spectators present, the court itself may withdraw to another room prepared for the purpose for deliberating in closed session.

It is not necessary, however, for the court to go into closed session upon a challenge where it is manifest that the action thereon will be unanimous. Thus, if the accused objects to a member because he preferred the charges and is the accuser and the member admits the fact, or upon a peremptory challenge, he may be excused without going into closed session. Care will be taken in such cases that no votes are taken in open session, and if any member believes the matter should be passed upon in closed session, it is proper for him to move that the court be closed, whereupon the president will announce that the court will be cleared.

(b) All questions arising during the trial, except upon questions of challenge, on the findings, and on the sentence, will be decided by the ruling of the president or the law member, as the case may be, in open court, in accordance with the provisions of A. W. 31, without closing the court, subject, however, to the right of any member to object to the ruling (except upon those questions of admissibility of evidence upon which the ruling of the law member is made final by the thirty-first article of war), upon which objection the court will be cleared and closed and the question decided by a majority vote, viva voce, beginning with the junior in rank. (See A. W. 31 and pars. 89 and 89a, supra.)

92. Sitting with Closed Doors.—A court-martial is authorized, in its discretion, to sit with doors closed to the public. Except, however, when temporarily closed for deliberation, courts-martial in this country are almost invariably open to the public during a trial. But in a particular case, where the offenses charged were of a scandalous nature, it was recommended that the court be directed to sit with doors closed to the public. (Digest, p. 516, IX, C.)

93. Change in Membership.—Although it is undesirable to change the membership of a court during a trial, it is within the discretion of the appointing officer in a proper case to relieve members or appoint new members, including the law member of a general court-martial. The promotion of a member during the trial of a case does not affect his competency as a member. He should sit according to his changed rank. The rule is that no member who has been

absent during the taking of evidence shall thereafter take part in the trial; but the nonobservance of this rule (particularly as regards the law member of a general court) shall not be construed as invalidating the proceedings of courts-martial if no objection is made and the court permits the member to sit. The rule, however, should be complied with when practicable. Especially should a member, other than the law member, who has been absent during an important part of the proceedings not be permitted to resume his seat. When a member who has been absent is permitted to resume his seat, or a new member is added after the trial of the case has begun, all proceedings and evidence during his absence should be read over to him in open court before the case proceeds further, and the record should show this fact; but in proceedings in revision the presence of any member who did not vote on the findings and sentence will invalidate the proceedings in revision.

Section II.

THE TRIAL JUDGE ADVOCATE.

94. Selection.—The prompt, speedy, and thorough trial of a court-martial case is largely dependent upon the trial judge advocate. He will, accordingly, be carefully selected. Where it can be avoided, no officer who has not had experience as a trial judge advocate will be detailed as trial judge advocate of a general court-martial unless he has had experience as a member or as defense counsel of a general court-martial, or as an assistant trial judge advocate of a court-martial, and is otherwise qualified by character and attainments for this duty.

95. General Duties.—The trial judge advocate of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of its proceedings. (A. W. 17.) Before the court assembles the trial judge advocate will obtain a suitable room for the court, see that it is in order, procure the requisite stationery, summon necessary witnesses, make a preliminary examination of the latter, and, as far as possible, systematize his plans for conducting the case. Dur-

ing the trial he executes all orders of the court; reads the appointing order and any modifying orders to the accused; swears the members of the court, the reporter, interpreter, and all witnesses; arraigns the accused; examines witnesses; keeps or superintends, under the direction of the court, the keeping of a complete and accurate record of the proceedings; and affixes his signature to each day's proceedings. Whenever the court adjourns to meet at the call of the president, the trial judge advocate will notify the members, as well as the defense counsel, the accused, and counsel for the accused, of the time designated by the president for reassembling. In conjunction with the president of the court, he authenticates the record by his signature, and, at the end of the trial, transmits the same to the reviewing authority. In case the record can not be authenticated by the president and trial judge advocate by reason of the death, disability, or absence of either or both of them, it shall be signed by a member in lieu of the president and by an assistant trial judge advocate, if there be one, in lieu of the trial judge advocate; otherwise by another member of the court. (A. W. 33.)

96. Duty Toward Accused.—It is not the office of the trial judge advocate, under the articles of war as amended by the code of 1920, to offer any advice to the accused; that is the duty of the defense counsel of the court and of the individual counsel, if any, of the accused. If, at any time prior to the trial or arraignment, the trial judge advocate desires to ask how the accused intends to plead, such question will be asked of the defense counsel or of other counsel, if any, of the accused. The trial judge advocate will in no case try to induce the accused to plead guilty, or leave him to infer that if he does so his punishment will be lighter. (Winthrop, p. 293.) When the accused determines to plead guilty the trial judge advocate will formally advise him in open court of his right to introduce evidence in explanation or extenuation of his offense and should assist him and the defense counsel and any other counsel for the accused in securing it.

97. Examination of Charges.—The trial judge advocate will note and report to the convening authority any irregu-

larity in the order convening the court or in the charges or other accompanying papers, either in substance or form. He may ordinarily correct obvious mistakes of form, or slight errors in names, dates, amounts, etc., but he will not, without the authority of the convening officer, make substantial amendments in the allegations, or reject or withdraw a charge or specification or substitute a new and distinct charge for one transmitted to him for trial by the proper superior (Digest, p. 496, IV, B, 1), except as provided, infra, in paragraph 158 and the various subparagraphs thereunder. It is the duty of the president as well as the trial judge advocate and the defense counsel of every court-martial to examine carefully the charges and the order of reference for trial, when referred for trial, in order that an accused may not be brought to trial before the wrong court.

NOTE.—Any corrections in the charges made at any time, either by the trial judge advocate or by the staff judge advocate will, each, be carefully initialed by the officer making them.

98. WHOLE TRUTH TO BE PRESENTED.—Throughout the trial the trial judge advocate should do his utmost to present the whole truth of the matter in question. He should oppose every attempt to suppress facts or to distort them, to the end that the evidence may so exhibit the case that the court may render impartial justice.

99. LEGAL ADVISER OF THE COURT.—While the court is in open session the trial judge advocate should respectfully call the attention of the court to any apparent illegalities in its action, and to any apparent irregularities in its proceedings. He should act as legal adviser of the court so far only as to give his opinion upon any point of law arising during the trial, when it is asked for by the court, in open court, but not otherwise. (See, however, par. 197.) In case the accused desires to plead guilty the trial judge advocate, as well as the defense counsel, will, whenever necessary, invite the attention of the president of the court to the fact that the effect of such plea must be explained to him. (See Chap. IX, Sec. II, "Pleas to the general issue.")

100. FREEDOM IN CONDUCTING CASE.—The trial judge advocate should be left free by the court to introduce his evi-

dence in such order as he sees fit, and in general to bring cases to trial in such order as he deems expedient. (Winthrop, pp. 281–284.) But, while it is not the province of the court to direct or control the trial judge advocate in his prosecution of the case, it is responsible for the thorough investigation of the case, and need not content itself with the evidence brought out by the prosecution and defense. It is proper for the court as a body or for any member to ask questions of a witness if it is believed the examination already submitted has failed fully to develop the case. Usually such questions are not asked until after the prosecution and defense have fully completed their examination of the witness. The court may direct that the trial judge advocate recall a witness, or to secure the attendance of a particular witness, or that he introduce evidence on a particular point. It is the duty of the court to take such action if it believes that thereby the facts in the case will be more clearly presented.

101. Closed Sessions.—Whenever a general or special court-martial shall sit in closed session, the trial judge advocate and the assistant trial judge advocate, as well as the defense counsel and the assistant defense counsel, and any other counsel for the accused, shall withdraw; and when their assistance in referring to the recorded evidence is required, it shall be obtained in open court, and in the presence of the accused and of both the trial judge advocate and the defense counsel as well as of the accused's individual counsel if there be any. (A. W. 30.) If through mistake or inadvertence the trial judge advocate should be present during all or a part of the closed session of a court, such irregularity is, subject to the provisions of A. W. 37, the ground for a disapproval of the proceedings by the reviewing authority, but it does not deprive the court of jurisdiction, and courts of the United States do not interfere in such a case to release a prisoner by a writ of habeas corpus. (Ex parte Tucker, 212 Fed. Rep., 569; see also A. W. 37.)

102. Accuser or Prosecutor.—The trial judge advocate is not challengeable; but in case of personal interest in the trial or of personal hostility toward the accused he should apply to the convening authority to be relieved.

103. Expediting Trials.—When charges have been ordered to trial by a general or special court-martial they are referred to the trial judge advocate of the court. It is his duty to bring them to trial promptly. In most cases tried by court-martial the facts are few and simple, and the witnesses are officers or soldiers stationed at the post where the trial is had. Usually the members of the court, the trial judge advocate, defense counsel, and the accused and his individual counsel, if any, are stationed at the same post. In such cases the trial should take place promptly. If the other official duties of the trial judge advocate, the defense counsel, and other counsel do not leave time to prepare cases properly and to bring them to trial promptly, the president will advise the commanding officer, with a view to their being relieved from other duties.

103a. Penalty for Delay.—Any officer responsible for unnecessary delay in investigating or carrying a case to a final conclusion shall be punished as a court-martial may direct. (A. W. 70.)

104. Weekly Reports.—On Saturday of each week each trial judge advocate of a general court-martial will report, through the president of the court and the commanding officer, to the appointing authority, a list of charges on hand, showing the date of receipt of each; and if any case has been in the hands of the trial judge advocate for more than two weeks and the record of trial has not been forwarded to the convening authority, the report will include a statement of the reasons for the delay. No record need be made of this report by the president of the court or the commanding officer.

105. Detail of Orderly.—The commanding officer will detail, when necessary, suitable soldiers as clerks or orderlies to assist the trial judge advocate of a general or special court-martial or military commission, or the recorder of a court of inquiry.

Section III.

ASSISTANT TRIAL JUDGE ADVOCATE.

106. Appointment.—The authority appointing a general court-martial shall appoint one or more assistant trial judge

advocates when necessary. (A. W. 11.) An assistant trial judge advocate of a general court-martial shall be competent to perform any duty devolved by law, regulation, or custom of the service upon the trial judge advocate of the court. (A. W. 116.)

107. DUTIES.—An assistant trial judge advocate will perform such duties in connection with the trial as the trial judge advocate may designate. Ordinarily he will be expected to assist the trial judge advocate in the preparation of cases for trial, in interviewing witnesses, looking up law and authorities, preparing a trial brief or memorandum for the use of the trial judge advocate at the trial, and trying such less important cases as the trial judge advocate may, with the consent of the court, direct, or taking charge of the investigation before trial and proof during the trial of any particular phase or phases of the charges in any case, and also to relieve the trial judge advocate of minor details, such as arranging for a place of meeting of the court, stationery, messenger service, stenographers and interpreters, subpœnaing witnesses, and notifying the court and the defense counsel and other counsel for the accused of the place and hour of meeting. During the trial he will be expected to see that witnesses are on hand when needed, that all details of procedure are observed, and the record accurately kept. As provided in A. W. 33, he may, in certain cases, authenticate the record of trial in lieu of the trial judge advocate; and in cases tried by him where the trial judge advocate was not present he will authenticate the record in lieu of the trial judge advocate. While a trial judge advocate and an assistant trial judge advocate will ordinarily be present during trial, if their duties require the presence of either of them elsewhere, he may be excused by the court, but the fact of his withdrawal or absence, the reason therefor, and his return to the court will be noted in the record. (See form for record of general court-martial, Appendix 10.)

Wherever in this Manual the trial judge advocate of a general court-martial is mentioned, the term will be understood to include assistant trial judge advocates, if any, unless the context shows clearly that a different sense is intended.

SECTION IIIA.

THE DEFENSE COUNSEL.

107a. Selection.—The thoroughness and fairness of trials, as well as the proper protection and rights of the accused before and at the trial, and promptitude in the preparation and in the trial, depend very largely upon the defense counsel of the court. He will, accordingly, be carefully selected. Where it can be avoided, no officer below the rank of captain will be detailed as defense counsel of a general court-martial.

Officers so detailed should have the qualifications prescribed in paragraph 94 for trial judge advocates, and should be selected with the same care.

107b. General Duties.—The defense counsel of a general or special court-martial will assist the accused in the preparation for trial and at the trial, and will examine the record of the proceedings of the court each day before it is authenticated. He will, as counsel for the accused, perform such duties as usually devolve upon the counsel for a defendant before the civil courts in criminal cases. He should guard the interests of the accused by all honorable and legitimate means known to the law, but should not obstruct the proceedings with frivolous and manifestly useless objections or discussions. Should the accused have counsel of his own selection, the defense counsel of the court will, if the accused so desires, act as associate counsel for the accused (A. W. 17), or will, if the accused so desires, turn over the entire defense at the trial to counsel of the accused's own selection, but in such case the defense counsel will nevertheless remain present in court and will make any suggestions to the accused's counsel, for the benefit of the defense, which he may think proper, and will remain ready to assist the defense at any time if requested; except that, if the accused (whether or not he has individual counsel) specially requests that the defense counsel or any particular defense counsel take no part in the case, the court will excuse him from attendance at the trial.

107c. Whole Truth to be Presented.—Throughout the trial the defense counsel of the court should do his utmost to present

the whole truth of the matter in question, and at the same time to place the facts before the court in the most favorable light for the accused. He, equally with the trial judge advocate, should oppose every attempt to distort facts, to the end that the defense may so exhibit the case that the court may render impartial justice.

107d. Legal Adviser to the Court.—The defense counsel of the court, equally with the trial judge advocate, is a legal adviser to the court. While the court is in open session the defense counsel should respectfully call the attention of the court to any apparent illegality in its action, and to any apparent irregularity in its proceedings. He should, equally with the trial judge advocate, act as legal adviser of the court so far as to give his opinion upon any point of law arising during the trial, when it is asked for by the court. As a general rule, the court will not ask for the opinion of the trial judge advocate upon any question arising during the trial without also asking for that of the defense counsel, and vice versa. When the legal advice or assistance of the defense counsel is required it will be obtained in open court.

107e. Freedom in Conducting the Case.—The defense counsel and other counsel for the accused should, equally with the trial judge advocate, be left free by the court to introduce his evidence in such order as he sees fit. But while it is not the province of the court to direct or control the defense counsel, or other counsel for the accused, in his presentation of the defense, the court is responsible for the thorough investigation of the case, and need not content itself with the evidence brought out by the prosecution and defense. (See par. 100, supra.)

107f. Personal Interest—Relief from Duty.—The defense counsel of the court is not challengeable, but in case of personal interest in the trial or of personal hostility toward the accused or toward the accuser he should apply to the convening authority to be relieved.

107g. Detail of Orderly.—The commanding officer will detail, when necessary, suitable soldiers as clerks or orderlies to assist the defense counsel of a general or special court-martial or military commission, in like manner as for the trial judge advocate thereof.

SECTION IIIB.

ASSISTANT DEFENSE COUNSEL.

107h. Appointment.—The authority appointing a general court-martial shall appoint one or more assistant defense counsel when necessary. (A. W. 11.) In general, the same number of assistant defense counsel should be appointed for a general court-martial as assistant trial judge advocates. An assistant defense counsel of a general court-martial shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon counsel for the accused (A. W. 116) or upon the defense counsel of the court.

107i. An assistant defense counsel will perform such duties in connection with the trial as the defense counsel of the court may designate. Ordinarily he will be expected to relieve the defense counsel of the court and the counsel for the accused of minor details, and in conjunction with the assistant trial judge advocate to see that witnesses are on hand when needed, that all details of procedure are observed, and that the record is properly kept. He may also be entrusted by the defense counsel of the court with advising the accused before trial and with the preparation of the case before trial and proof during trial of any special phase of the defense. While the defense counsel of the court and the assistant defense counsel will ordinarily both be present during trial, if their duties require the presence of either of them elsewhere he may be excused by the court, but the fact of his withdrawal or absence, the reason therefor, and his return to the court will be noted in the record. (See form for record of general court-martial, Appendix 10.)

Wherever in this Manual the defense counsel of a general court-martial is mentioned, the term will be understood to include assistant defense counsel of the court, if any, unless the context shows clearly that a different sense is intended.

SECTION IV.

INDIVIDUAL COUNSEL FOR THE ACCUSED.

108. APPOINTMENT.—In addition to the services of the defense counsel of the court, the accused has the right to be

represented before a general or special court-martial by civilian counsel of his own selection, or by military counsel of his own selection if such counsel be reasonably available. Such military counsel will, if requested by the accused, be detailed as soon as practicable after the charges are referred for trial (or, in case the accused is placed under arrest or in confinement, then as soon as practicable after such arrest and confinement). Civilian counsel will not be provided at the expense of the Government. Should the accused have counsel of his own selection, either military or civilian, the defense counsel and assistant defense counsel, if any, of the court, shall, if the accused so desires, or unless the accused objects, act as his associate counsel. (A. W. 17; and see par. 107b, supra.) Whenever the accused introduces individual counsel at the trial he will be asked whether he is willing to have the defense counsel act as his associate counsel. Should the accused request the appointment as his individual counsel of an officer stationed at the station where the court sits, and such officer be not a member nor trial judge advocate nor assistant trial judge advocate of the court, the commanding officer will appoint such officer as such individual counsel if he is reasonably available. Should the commanding officer decide that the officer so desired by the accused is not reasonably available, the accused may appeal to the officer appointing the court, whose decision shall be final. If the counsel desired by the accused is not under the control of the commanding officer where the trial is held, timely application for such individual counsel will be submitted by the accused in writing to the appointing authority, whose decision as to whether the officer desired is "reasonably available" is final.

109. Duty of Officer as Individual Counsel for the Accused.—An officer acting as individual counsel for the accused before a general or special court-martial should perform such duties as usually devolve upon the counsel for a defendant before civil courts in criminal cases. He should guard the interests of the accused by all honorable and legitimate means known to the law. He should not obstruct the proceedings with frivolous and manifestly useless objections or discussions. He will ordinarily, unless the accused per-

sonally objects thereto, avail himself of the services of the defense counsel of the court and assistant defense counsel, if any, as associate counsel in accordance with the provisions of A. W. 17.

109a. Opportunity to Prepare for Trial.—Ample opportunity will be given to trial judge advocate, defense counsel, and individual counsel for accused properly to prepare the prosecution and defense of each case, respectively, and for that purpose they will be excused from any other duty that may interfere with such work.

110. Right to Interview the Accused.—An accused, even in close arrest, will be allowed to have such interviews with the defense counsel of the court and with his individual counsel, military or civil, as may be required in order to prepare his defense. The defense counsel and other counsel for the accused will also be permitted to have interviews with any other person who may be a witness for the accused or for the prosecution, or whose knowledge of facts may be useful to the accused in preparing his trial.

111. Witnesses, How Questioned During the Trial.—If the trial judge advocate personally prepares the record, the defense counsel and other counsel for the accused will be required to reduce his questions and arguments to writing; but if the court has a stenographic reporter, counsel will be allowed to question witnesses and address the court orally.

Section V.

REPORTER.

112. Employment.—Under such regulations as the Secretary of War may from time to time prescribe, the president of a court-martial or military commission or a court of inquiry shall have power to appoint a reporter, who shall record the proceedings of and testimony taken before such court or commission and may set down the same, in the first instance, in shorthand. (A. W. 115.) Reporters are authorized for all general courts-martial, military commissions, and courts of inquiry, and for special courts-martial when the

appointing authority directs that the testimony be reduced to writing.

NOTE.—For form of oath for reporter see paragraph 135.

112a. Duties.—It is the sworn duty of a stenographic reporter to take down in his notes and to transcribe into the record everything that actually occurs in open court, unless otherwise directed by the court itself. Neither the trial judge advocate nor counsel for the accused may direct the reporter to omit anything, either from his notes or from his transcript thereof for the record. It is the reporter's duty to disregard any such instructions from anyone except the court itself.

113. COMPENSATION—DECISIONS.—The reporter shall be paid at the following rates of compensation by the Finance Department on vouchers certified to be correct by the trial judge advocate or recorder:

(*a*) For each day in attendance at court $5, and in addition thereto 50 cents an hour for time actually spent in court during the trial or hearing. Time will be reckoned to the nearest half of an hour.

(*b*) Twenty cents for each 100 words for transcribing notes and making that portion of the original record which is typewritten; but no allowance shall be made for the first carbon copy of that portion of the record which is typewritten or for original papers which are appended as exhibits.

(*c*) Fifteen cents for each 100 words for copying papers material to the inquiry, and 2 cents for each 100 words for each carbon copy of the same, when ordered by the court or commission for its use.

(*d*) Two cents for each 100 words for the second and each additional carbon copy of the record when authorized by the convening authority.

(*e*) Except for such part of the journey as may be covered by Government transportation, mileage at the rate authorized for a civilian witness not in Government employ, and $4 a day for expenses when the trial judge advocate or recorder keeps him, at his own expense, away from his usual place of employment for 24 hours or more, on public business referred to the court or commission, shall be allowed the re-

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porter for himself, and, when ordered by the court or commission, for each necessary assistant.

(*f*) An Army field clerk, or a field clerk Quartermaster Corps, warrant officer, or member of the Army Nurse Corps, is not entitled to any extra pay or other compensation for services as a stenographic reporter for a court-martial, court of inquiry, military commission, or military board, although performed while on leave of absence or any time outside of regular duty hours. (Dec. of the Comp., Nov. 15, 1920; A. D. No. 5245.)

NOTE.—The following decisions regarding compensation of reporters will be observed in preparing vouchers:

(*a*) In determining the period for which a reporter is entitled to the allowance of $3 (now $4) a day for expenses when kept away from his usual place of employment time, should be counted from the date on which he is required to leave his usual place of business by the terms of his employment to the date of his return thereto, provided there be no unnecessary delay in the travel to and from the place where the court meets. (Par. 1274, Manual Q. M. Corps, 1916.)

(*b*) The fact that a reporter returns each night to his home does not preclude the view that he was kept away from his place of business for 24 hours. He is not, however, entitled to mileage for such journeys unless the sessions of the court are held on nonconsecutive days. (Op. J. A. G., Sept. 7, 1910.)

(*c*) A reporter serving two separate courts-martial on the same day is entitled to have his allowances (except mileage) computed separately for each court. (Op. J. A. G., Oct .13, 1910.)

(*d*) A reporter duly employed, but who, after arrival at court, performs no service, owing to adjournment, is entitled to mileage, $5 for constructive attendance, and also to the additional $4 if kept away from place of business for 24 hours. (See Op. J. A. G., Feb. 18, 1911; June 4, 1914.)

(*e*) The abbreviations "Q.," standing for the word question, and "A.," standing for the word answer, and all dates, as "25th" and "1914," will each be counted as one word. Punctuation marks will not be counted as a word. It is not necessary for the trial judge advocate to count the actual number of words on every page to justify him in certifying the account of the reporter. He may ascertain the total number of words by counting the words on a sufficient number of pages to enable him to ascertain a fair average of the number of words on a page and then ascertain the total by multiplying this average by the number of pages. (Op. J. A. G., Oct. 22, 1909; Feb. 8, 1915.)

114. DISPOSITION OF VOUCHERS.—The original voucher for payment of the reporter will be properly completed and cer-

tified by the trial judge advocate and will be sent for payment to the nearest disbursing finance officer. A carbon copy of the voucher will be forwarded with the record for the information of the appointing authority.

NOTE.—For form of voucher for payment of reporter, see Appendix 25.

115. DETAIL OF SOLDIER.—A soldier may be detailed to serve as a stenographic reporter for general courts-martial, courts of inquiry, and military commissions, and while so serving shall receive extra pay at the rate of not exceeding 5 cents for each 100 words taken in shorthand and transcribed, such extra pay to be met from the annual appropriation for expenses of courts-martial. (Act of Aug. 24, 1912, 37 Stat. 575.) Such detail will be made only when a reporter is authorized by paragraph 112, supra, or by the appointing authority.

116. TIME LIMIT FOR COMPLETING RECORD.—The trial judge advocate or recorder shall require the reporter to furnish the typewritten record of the proceedings of each session of the court or commission (together with one carbon copy of the same) not later than 24 hours after the adjournment of that session. The complete record will be finished, indexed, bound, and ready for authentication not later than 48 hours after the completion of its action by the court or commission on the merits of the case or hearing.

NOTE.—The provisions of A. W. 70 should be borne in mind, making punishable as a court-martial may direct any unnecessary delay in carrying a case to final conclusion.

117. CARBON COPIES OF THE RECORD.—Whenever a record of a trial by court-martial is to be typewritten by a reporter, the trial judge advocate will inform the accused of his right to demand a copy of the record, and will require of him a statement as to whether or not he desires a copy. If the answer be in the affirmative, the trial judge advocate will cause the reporter to prepare a carbon copy; this copy will be turned over to the accused personally, whose personal written receipt therefor will be attached to the record; unless the accused declines to sign the receipt, in which case an affidavit of the delivery of such carbon copy to the accused made by the

person delivering it to him, will be attached to the record of trial.

118. Extra Compensation for Clerical Duties.—No person in the military or civil service of the Government can lawfully receive extra compensation for clerical duties performed for a military court, except as a reporter duly appointed or detailed as such, as provided in paragraphs 112 and 115, supra; and, except as authorized in paragraph 115, no person in the civil or military service will be entitled to extra compensation for service as a reporter unless such service is rendered in time outside of the business hours of his regular employment and does not interfere with his performance of his regular duties.

NOTE.—See, however, paragraph 113 (f), supra.

Section VI.

INTERPRETER.

119. Employment and Pay.—Under such regulations as the Secretary of War may from time to time prescribe, the president of a court-martial or military commission, or court of inquiry, or a summary court, may appoint an interpreter, who shall interpret for the court or commission. (A. W. 115.) Interpreters may be employed whenever necessary without application to the appointing authority. They will be allowed the pay and allowances of civilian witnesses, which will be paid by the Finance Department on vouchers certified by the trial judge advocate or recorder.

Note.—For oath of interpreter see paragraph 130.

CHAPTER VIII.

COURTS-MARTIAL—ORGANIZATION.

(Continued.)

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SECTION I.

CHALLENGES.

120. OCCASION FOR.—The composition of the court-martial having been made known to the accused by the reading of the appointing order, together with any orders which have operated to modify the composition of the court as originally constituted, it becomes the duty of the trial judge advocate on behalf of the prosecution to challenge any member of the court present named in the order and modifying orders to whom the prosecution objects. The trial judge advocate performs this duty by challenging, in turn, each member to whom he objects. Members of a general or special court-martial may be challenged by the trial judge advocate or by the accused, but only for cause stated to the court, except that each side is entitled to one peremptory challenge; but the law member of the court shall not be challenged except for cause. (A. W. 18.) Challenges by the trial judge advocate shall ordinarily be presented and decided before those by the accused are offered. The trial judge advocate may use his one peremptory challenge either before presenting any challenges for cause or after presenting one or more challenges for cause and while he still has others to present, or after presenting all his challenges for cause, at any time he sees fit, until he announces his acceptance of the panel. He may, if he sees fit, after challenging a member for cause, if the challenge be overruled, use his peremptory challenge to remove such member from the court. After a trial judge advocate has presented all the challenges which he has to present and they have been decided, or in case he does not object to any member of the court, he will ask the accused whether he objects to being tried by any member present named in the order and modifying orders. This question by the trial judge advocate will be considered as a statement that the prosecution accepts the panel as it then stands and has no further challenges to present and tenders it to the accused. If the reply of the accused be in the negative, the court and the trial judge advocate and the assistant trial judge advocate, if any, are sworn; if, on the other hand, the accused desires to object to any member or members of the court, he exercises his right in this respect, in person

or through counsel, by challenging, in turn, each member to whom he objects, in like manner as the trial judge advocate, and may likewise use his peremptory challenge at any time he sees fit until he has finally accepted the panel. The court shall determine the relevancy and validity of challenges for cause, and shall not receive a challenge to more than one member at a time. (A. W. 18.) Neither the prosecution nor the accused may challenge the law member of the court except for cause. Neither a summary court officer nor the trial judge advocate nor the defense counsel of a general or special court-martial is subject to challenge. (Digest, p. 502 IV, N; Davis, p. 85, n. 3.)

NOTE 1.—The various classes of challenges for cause recognized at common law have been practically reduced in courts-martial practice to two, viz, (1) principal challenges, or those where the member must be excused upon proof of the ground for challenge as alleged; (2) for favor, where the court must decide whether the facts proved constitute cause to excuse the member.

NOTE 2.—For procedure of the court in ruling and voting on challenges see paragraph 125, infra.

120a. A peremptory challenge does not require any good reason or ground therefor to exist or to be stated.

121. GROUNDS FOR CHALLENGE—(*a*) *Principal Challenges.*—In the following cases a member will be excused when challenged upon proof of the fact as alleged:

(1) That he sat as a member of a court of inquiry which investigated the charges.

(2) That he has personally investigated the charges and expressed an opinion thereon, or that he has formed a positive and definite opinion as to the guilt or innocence of the accused.

(3) That he is the accuser.

(4) That he will be a witness for the prosecution or for the defense.

(5) That (upon a rehearing of the case) he sat as a member on the former trial.

(6) That, in the case of the trial of an officer, the member will be promoted by the dismissal of the accused.

(7) That he is related by blood or marriage to the accused.

(8) That he has a declared enmity against the accused.

(*b*) *Challenges for Favor.*—Where prejudice, hostility, bias, or intimate personal friendship are alleged it is for the court, after hearing the grounds for challenging stated and the reply, if any, of the challenged member, as well as any other evidence presented, to determine whether the grounds stated and proved or admitted are sufficient in fact to disqualify a challenged member.

122. CHALLENGE OF NEW MEMBER.—Where new members join or are added to the court after its organization the order detailing such new members shall be read and the trial judge advocate and the accused be given full opportunity to challenge. The record will show affirmatively that the right has been accorded the accused to challenge every member of the court.

Either side may use its one peremptory challenge against any such new member, unless it has already been used.

[*Paragraph 123 has been omitted in this revision.*]

124. MEMBER CAN NOT CHALLENGE.—There is no authority of law or custom of the service for a member of a court-martial to challenge another member, but where one member has knowledge of the fact that another is the accuser in the case or will be a witness for the prosecution, or investigated the case, or is subject to challenge for any other reason, he will bring the fact to the attention of the court in order that proper action may be taken. (See par. 129, below.)

125. PROCEDURE UPON CHALLENGES.—A positive declaration by a member challenged on the ground of prejudice or interest that he is not prejudiced for or against the accused nor interested in the case should ordinarily be satisfactory to the trial judge advocate and the accused, and, if so, the challenger should be permitted to withdraw the challenge and the record should so show. If, however, the statement is unsatisfactory, or the member makes no response, the challenger may offer testimony in support of his challenge or may subject the challenged member to an examination under oath as to his competency as a member. In such a case the trial judge advocate administers the oath to the challenged member. Witnesses may be introduced in rebuttal on behalf of the

challenged member and arguments may be made. All challenges which are not withdrawn, except where a member is challenged as the accuser or as a witness for the prosecution and such fact is admitted, must be passed upon by the court. After all evidence pro or con has been received, or the challenger or challenged member, either or both, has declined to introduce any evidence, the court will be closed, and the court will deliberate and vote upon the challenge by secret written ballot, which ballot may be in the form "sustained" or "not sustained." The junior member of the court shall in each case count the votes, which count shall be checked by the president, who will announce the result of the ballot to the members of the court. All ballots shall be destroyed as soon as the result is announced, unless some member of the court desires first to verify the count, when they shall be immediately destroyed after such verification. A majority of the ballots cast by the members present at the time the vote is taken shall decide the question of sustaining or not sustaining the challenge. (A. W. 31.) A tie vote on a challenge is a vote in the negative, and the challenge is not sustained. Upon the court being opened, the president shall state, in the presence of the trial judge advocate, assistant trial judge advocate, defense counsel and assistant defense counsel, other counsel for the accused, and the accused, that the challenge has been sustained or not sustained. The whole proceedings will, in the case of a general court-martial, or a special court-martial where the evidence has been ordered recorded, appear in the record; and in the case of any other special court-martial, the record will show that evidence touching the eligibility of the challenged member was heard, if such be the fact, and that the challenge was sustained or not sustained upon the taking of a secret ballot. During the deliberation of the court the challenged member will withdraw. If but four members of a general court-martial, or two members of a special court-martial, remain they may pass upon the challenge. (See Chap. II, Sec. II.)

NOTE.—For form of oath to be administered to challenged member see paragraph 137.

126. MEMBER DISQUALIFIED BUT NOT CHALLENGED.—(a) In the absence of a challenge the court of itself will not

ordinarily excuse a member from sitting on the trial of a case, but a member not challenged, who has formed an opinion concerning the case or any of the material facts thereof, or who for any other reason thinks himself disqualified, or who is aware of any facts which he believes might cause either party to desire to challenge him, or who thinks himself disqualified for reasons other than those indicated in paragraph 129, below, will announce in open court his supposed disqualification, or the facts which he thinks might cause either party to desire to challenge him (that is, that he has some knowledge of the facts, or has formed some opinion, etc., but will carefully refrain from stating his opinion as to the guilt or innocence of the accused, or the particular facts of which he has knowledge), in order that he may be challenged; or he may apply to the appointing authority to be relieved.

(b) While a member is not, strictly speaking, "a witness" within the meaning of the eighth or ninth articles of war, or of this paragraph, unless he actually testifies at the trial, still, as a matter of good administration and in harmony with the spirit and purpose of the articles of war, a member may be excused by the court without challenge, and should be so excused (unless the objection is voluntarily waived by the defense) whenever it appears to the court either that (1) he testified or submitted a written statement on the preliminary investigation, unless at the request of the accused; (2) he investigated the charges either under paragraph 76a, supra, or otherwise, or made any official report or indorsement expressing his opinion thereon; (3) he was the medical officer before whom the accused was brought for examination under the provisions of paragraph 76a, supra, during the investigation of the charges, or was a member of a medical board convened in the case under the provisions of paragraph 76c, supra, or of paragraph 219d, infra, or has in any other case where the sanity or mental condition of the accused is made an issue in the trial officially expressed his opinion thereon; or (4) if, on the opening of the trial or at any time during the trial, the trial judge advocate announces that the member is a witness for the prosecution or that it is expected that he will be called as a witness for the prosecution.

NOTE 1.—As to statutory disqualification see paragraphs 129 to 131, infra.

NOTE 2.—Where a member of the court was a member of a medical board convened under paragraph 76c, supra, or under paragraph 219d, infra, whose report is received in evidence at the trial under any of the provisions of paragraph 219, infra, he thereby becomes a witness within the meaning of the eighth and ninth articles of war, and is a witness for the prosecution and as such disqualified to sit further on the trial, if the report of such medical board (unless such member signed a minority report dissenting therefrom), or a minority report signed by such member, is to the effect that the accused did not at the time of his examination by such medical board, nor at the time of the commission of the alleged offense, suffer from any mental defect or derangement whatever.

127. Waiver of Objection.—The rule is that challenges should be made before the arraignment, and if an objection to the competency of a member, except his ineligibility under paragraph 129, infra, was known at that time and not made, it will be considered as waived; but if the cause of a member's incompetency was not known at the time of arraignment or did not arise until later, the court will entertain a challenge on such cause at any stage of the proceedings.

NOTE.—Ineligibility under paragraph 129, infra, being mandatory under the statute (A. W. 8, 9), can not be waived. If, therefore, it develops, at any time during the trial, that a member is (a) an accuser or (b) a witness for the prosecution, he must be excused, although not challenged.

128. Liberality Required.—Courts should be liberal in passing upon challenges, but they will not entertain an objection that is not specific, and they should be reluctant to sustain one upon the mere assertion of the challenger, except where it is admitted by the challenged member.

129. Member as Accuser or Witness for the Prosecution.—No officer shall be eligible to sit as a member of a general or special court-martial when he is the accuser or a witness for the prosecution. (A. W. 8, 9.) After the accused is brought before the court, preferably before the court is sworn, any member thereof who is or believes himself to be the accuser in the case will formally announce that fact to the court, whereupon he will be excused. When the accused, his counsel, the trial judge advocate, the defense counsel, or any member of the court, at any time before the sentence, shall have reason to believe that any member thereof is the accuser in the case, or may be called as a wit-

ness for the prosecution, such belief shall be communicated to the court, and if the court, after hearing the facts, find that such member is the accuser or is to be called as a witness for the prosecution, he shall be excused. If at any stage of the proceedings prior to the findings any member of the court be called as a witness for the prosecution, he shall, before qualifying as a witness, be excused from further duty as a member.

130. MEMBER SIGNING CHARGES—ACCUSER.—Whether or not an officer who is a member of the court is the accuser in a particular case is a question of fact. If, notwithstanding his ineligibility, he does sit as a member of a general or special court-martial, the proceedings are necessarily invalid. (A. W. 8, 9; Op. J. A. G., Oct. 11, 1913; id., Nov. 13, 1913, Bul. 38, War Dept., 1913, p. 6.) An officer who has signed and sworn to the charges in a particular case is necessarily an accuser in that case, and therefore ineligible to sit as a member of the trial court. But, while prima facie the person who signs and swears to the charge is the only accuser in the case, that is not always true. There may in fact be another or several others who are real accusers, and therefore also ineligible to sit on the trial court. If such a question arises at any time during the trial it is within the province of the court to hear evidence on that issue and to decide the question. If in such a case the court should decide that any member so in question is eligible, such decision and all the evidence upon which the court reached its decision will, in the case of a general court-martial, or in the case of a special court-martial where the evidence has been ordered recorded, be made of record; and in the case of any other special court-martial the record will show that evidence touching the eligibility of the officer was heard by the court, and a summary of such evidence, and the finding arrived at thereon.

NOTE. As to the procedure of the court in determining the question of the eligibility of the member, see paragraph 125.

131. MEMBER OF COURT AS WITNESS.—(*a*) *For the Prosecution.*—No officer shall be eligible to sit as a member of a general or a special court-martial who is a witness for the prosecution. (A. W. 8, 9; Bul. 38, War Dept., 1913, p. 6.)

(*b*) *For the Defense.*—The fact that a member is a witness for the defense will not necessarily disqualify him to sit as a member of the court, and the fact that such a witness sits throughout the trial as a member of the court will not in any way affect the validity of its proceedings.

(*c*) *When Called by Court.*—Whether a member called as a witness by the court is to be considered as a witness for the prosecution depends on the character of his testimony, which should be carefully considered before a conclusion is reached that he is not. In any case of doubt he should be excused from further participation in the trial as a member.

SECTION II.

OATHS.

132. OATH OF MEMBERS.—(*a*) The challenges having been disposed of, the trial judge advocate of a general or special court-martial shall administer to the members of the court, before they proceed upon any trial, the following oath or affirmation (A. W. 19):

You, A. B., do swear (or affirm) that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the Armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear (or affirm) that you will not divulge the findings or sentence of the court until they shall be published by the proper authority or duly announced by the court, *except to the* trial *judge advocate and assistant* trial *judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial* upon a challenge or upon the findings or sentence, *unless required to give evidence thereof as a witness by a court of justice in due course of law. So help you God.*

(*b*) In case of affirmation the closing sentence of adjuration will be omitted.

(*c*) When more than one case is tried by the same court, the oath must be administered anew for each case.

(*d*) The oaths or affirmations prescribed in A. W. 19 for the members, the trial judge advocate, a witness, and others will always be administered, but in addition there may be such additional ceremony or acts as will make the oath or affirmation binding on the conscience of the person taking it.

(*e*) For decorum to be observed during the administration of oaths see Chapter VII, Section I.

133. Oath of Trial Judge Advocate.—When the oath or affirmation has been administered to the members of a general or special court-martial, the president of the court shall administer to the trial judge advocate and to each assistant trial judge advocate, if any, an oath or affirmation in the following form (A. W. 19):

You, A. B., do swear (or affirm) that you will faithfully and impartially perform the duties of a trial judge advocate, and will *not divulge the findings or sentence of the court to any but the proper authority until they shall be duly disclosed. So help you God.*

134. Oath of Witness.—(*a*) All persons who give evidence before a court-martial shall be examined on oath or affirmation in the following form (A. W. 19), administered by the trial judge advocate:

You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God.

(*b*) If either the trial judge advocate or assistant trial judge advocate is to testify, the oath or affirmation will be administered by the other or by the president.

135. Oath of Reporter.—(*a*) Every reporter of the proceedings of a court-martial shall, before entering upon his duties, make oath or affirmation in the following form (A. W. 19), administered by the trial judge advocate:

You swear (or affirm) that you will faithfully perform the duties of reporter to this court. So help you God.

(*b*) For authority for hiring reporters and compensation see Chapter VII, Section V.

136. Oath of Interpreter.—Every interpreter in the trial of any case before a court-martial shall, before entering upon his duties, make oath or affirmation in the following form (A. W. 19), administered by the trial judge advocate:

You swear (or affirm) that you will truly interpret in the case now in hearing. So help you God.

137. OATH TO TEST COMPETENCY.—When a member of a general or special court-martial is challenged and it is desired to question him regarding his eligibility to sit as a member in the trial of a case, the trial judge advocate will administer to him the following oath:

You swear that you will true answers make to questions touching your competency as a member of the court in this case. So help you God.

138. OATHS FOR ADMINISTRATIVE PURPOSES.—(*a*) Any officer or clerk of any of the departments lawfully detailed to investigate frauds on, or attempts to defraud, the Government, or any irregularity or misconduct of any officer or agent of the United States, and any officer of the Army, Navy, Marine Corps, or Revenue-Cutter Service detailed to conduct an investigation, and the recorder, and if there be none the presiding officer, of any military, naval, or Revenue-Cutter Service board appointed for such purpose, shall have authority to administer an oath to any witness attending to testify or depose in the course of such investigation. (R. S., § 183, as amended by the act of Feb. 13, 1911, 36 Stat., 898.)

(*b*) Any judge advocate or acting judge advocate, the president of a general or special court-martial, any summary court-martial, the trial judge advocate or any assistant trial judge advocate of a general or special court-martial, the president or the recorder of a court of inquiry or of a military board, any officer designated to take a deposition, any officer detailed to conduct an investigation, and the adjutant of any command shall have power to administer oaths for the purposes of the administration of military justice and for other purposes of military administration; and in foreign places where the Army may be serving shall have the general powers of a notary public or of a consul of the United States in the administration of oaths, the execution and acknowledgment of legal instruments, the attestation of documents, and all other forms of notarial acts to be executed by persons subject to military law. (A. W. 114.)

SECTION III.

CONTINUANCES.

139. AUTHORITY FOR.—A court-martial may, for reasonable cause, grant a continuance to either party for such time and as often as may appear to be just. (A. W. 20.) If before the first meeting of the court a continuance is deemed necessary by either party, application therefor should be made to the appointing authority, but if made after assembling the application will be made to the court. When application is made to the court for an extended delay which appears to be well founded, it may be referred to the appointing authority in order that he may determine whether the court should grant it or whether he should dissolve the court.

140. REASON FOR APPLICATION TO BE STATED.—The party desiring a continuance must state the reasons upon which his application is based. When it is desired because of the absence of a witness he should distinctly show that the witness is material, that he has used due diligence to procure the testimony or attendance of the witness, and that he has reasonable ground to believe that he will be able to procure such testimony or attendance within a reasonable time, which time shall be stated, and the facts which he expects to be able to prove by such witness, and that he can not so well prove the same by any other testimony or evidence in the case. If the opposite party will admit that the absent witness, if present in court, would testify as stated, then the court may, in its discretion, refuse a continuance for the purpose of procuring such testimony. (See notes 3 and 4 to par. 159, infra.)

141. NUMBER OF CONTINUANCES.—The number of continuances which may be granted is not limited, but where extended delays will ensue the court will be justified in exacting proof of due diligence on the part of the party requesting the same, and may even require the reasons to be stated under oath if it has reason to suspect that the intention is merely to delay the proceedings.

SECTION IV.

COMPLETION OF ORGANIZATION.

142. WHEN ACCOMPLISHED.—The court having met, the accused and his individual counsel, if any, having been introduced, and the defense counsel of the court being present, the reporter sworn, and the convening order read, the right of challenge accorded, and the court and trial judge advocate sworn, the organization of the court is complete for the trial of the case.

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CHAPTER IX.

COURTS-MARTIAL—PROCEDURE DURING TRIAL.

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SECTION I.

ARRAIGNMENT.

143. WHEN MADE.—Upon the completion of the organization of the court in accordance with the provisions of paragraph 142, supra, the court is ready to proceed with the trial of the charges in the case then before the court. In each case tried by the court the appointing order must be read anew, a new opportunity to challenge must be given, and the members, trial judge advocate and assistants, if any, reporter, and interpreter must be sworn anew. In each case the proceedings must be complete without reference to any other case.

144. PROCEDURE.—The court being organized, and both parties ready to proceed, the trial judge advocate will read the charges and specifications, separately and in order, to the accused and ask him how he pleads to each. The order pursued, in case of several charges or specifications, will be to arraign on the first, second, etc., specifications to the first charge, then on the first charge, and so on with the rest. The reading of the charges and specifications and the pleas of the accused in answer thereto constitute the arraignment of the accused. In reading the charges the trial judge advocate will also read the name and rank of the officer preferring them.

NOTE.—For decorum to be observed during the arraignment see paragraph 86.

SECTION II.

PLEAS.

145. KINDS OF PLEAS.—In court-martial procedure the usual pleas are the following: (*a*) Pleas to the jurisdiction; (*b*) pleas in abatement; (*c*) pleas in bar of trial; and (*d*) pleas to the general issue. The first three mentioned are also known as special pleas. These pleas should be made in the order named. (Dudley, p. 93; Bouvier's Law Dictionary, Rawle, 3d Rev., p. 2603.)

146. Plea to the Jurisdiction.—A plea to the jurisdiction denies the right of the court to try the case. The following are grounds for a plea to the jurisdiction of a court:

(*a*) That it was appointed by an officer who did not have the legal authority to do so (see Chap. III, Courts-martial—By whom appointed);

(*b*) That it is composed wholly or in part of members not authorized by law to sit upon such court-martial (see Chap. II, Courts-martial—Composition);

(*c*) That the accused is not subject to its jurisdiction (see Chap. I, Persons subject to military law); or

(*d*) That it has not legal power to try the offense charged (see Chap. XVII, Punitive articles).

A plea to the jurisdiction, if well grounded and sustained by the court, bars further prosecution before the court. If well grounded and not sustained by the court, the proceedings may be disapproved by the appointing authority, or, even though approved, may be reviewed on writ of habeas corpus by a United States court, which will cause the proceedings to be set aside as illegal and void. Waiver of objection will never avail to confer jurisdiction upon a court not legally possessing it, even though the accused fails to submit a plea to the jurisdiction at the proper time.

The objection may be taken at any time during the proceedings, and after a plea of either "guilty" or "not guilty"; and failure of the record to show jurisdiction will be ground for disapproval, or for setting aside the proceedings, findings, and sentence.

NOTE 1.—It is the imperative duty of the trial judge advocate to see that the record shows all the essential jurisdictional facts, including particularly evidence that (a) the accused is a person subject to military law, and (b) that the person arraigned before the court as the accused is actually the same person named as the accused in the charges.

A plea of not guilty or of guilty to a specification, without raising any question of identity, is sufficient evidence that the accused so pleading is the same person named in the specification.

NOTE 2.—Whenever the findings and sentence are disapproved or vacated because of failure of the record to show jurisdiction, a rehearing or new trial before another court may be ordered, unless the

record of trial affirmatively shows that accused is not a person subject to military law. But in any such case, if execution of the sentence had been ordered by the reviewing authority (or, if there be one, by the confirming authority) before it was so disapproved or vacated (A. W. 40, 50½), the accused may, at such second trial, plead to the jurisdiction that the court at the former trial did in fact—although not so shown by its record—have jurisdiction; and if such plea be sustained by the proofs, the proceedings will thereupon be terminated for want of jurisdiction.

147. Plea in Abatement.—A plea in abatement is based upon some defect in the charge or specification and is one that operates merely to delay the trial, such as an error in the name, rank, or organization of the accused or in the allegation as to time and place in the specification. An accused who submits a plea in abatement must show how the error may be amended. When a plea in abatement is sustained, the trial judge advocate will correct the charge and specification objected to so as to meet the objection, and the trial will proceed on the corrected charges. To enable him to make the correction a continuance may be granted. Matters which might have been objected to by a plea in abatement will be considered as waived by pleading to the general issue.

148. Plea in Bar of Trial.—A plea in bar of trial, if sustained, is a substantial and conclusive answer to the charge or specification to which it is addressed. Such a plea may be made on the grounds set forth in paragraphs 149, 150, and 151.

NOTE.—Insanity or mental defect or derangement need not be specially pleaded, but the question may be raised on the trial at any time before sentence. (See paragraph 219, infra.)

149. The Statute of Limitations.—(1) *Definition.*—Statutes of limitation in criminal law are statutes of which the accused may take advantage and deprive the Government of the power to try and punish him after the lapse of a specific period since the offense was committed. They are enacted to secure the prompt punishment of criminal offenses and with a view to obtain the attendance of the witnesses at the trial while the recollection of the event is still fresh in their minds. In court-martial practice prosecutions are limited both as to time and as to number. (A. W. 39, 40.)

(2) *Limitations as to Time.*—(*a*) In the following cases there is no limitation as to time upon trial by court-martial (A. W. 39), viz:

(1) Desertion committed in time of war;
(2) Mutiny; or
(3) Murder.

(*b*) The period of limitation upon trial and punishment by court-martial shall be three (3) years in the following cases (A. W. 39), viz:

(1) Desertion in time of peace;
(2) Any crime or offense punishable under A. W. 93; or
(3) Any crime or offense punishable under A. W. 94.

(*c*) No person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense not enumerated in subparagraph (*a*) or subparagraph (*b*), supra, committed more than two (2) years before the arraignment of such person (A. W. 39).

(*d*) *Computation of the period of limitation.*—The point at and from which the period of limitation is to begin to run is the date of the commission of the offense. The point at which the period of limitation is to terminate and from which said period is to be reckoned back is the date of arraignment of the accused. There must be excluded in computing this period—

(1) The period of any absence of the accused from the jurisdiction of the United States; and
(2) Any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice.

NOTES.—"Manifest impediment" means only such impediments as operate to prevent the court-martial from exercising its jurisdiction, and includes such conditions as being held as a prisoner of war in the hands of the enemy, or being imprisoned under the sentence of a civil court upon conviction of crime (In re Davison, 4 Fed. Rep., 516); but any concealment of the evidence of their guilt or other like fraud on their part while they remain within the jurisdiction of the United States by which the prosecution is delayed until the time the bar has run does not deprive them of the benefit of the statute. (14 Op. Atty. Gen., 268.)

The thirty-ninth article of war does not have the effect to authorize trial or punishment for any crime or offense barred by the provisions of law existing at the date of its taking effect, viz, February 4, 1921.

(3) *Limitation as to Number of Trials.*—(*a*) No person shall be tried a second time for the same offense. (A. W. 40.)

(*b*) A person subject to military law has not been "tried" in the sense of A. W. 40 in any of the following cases:

Where the party, after being arraigned or tried before a court which was illegally constituted or composed, or was without jurisdiction, was again brought to trial before a competent tribunal; where the accused, having been arraigned upon and having pleaded to certain charges, was rearraigned upon a new set of charges substituted for the others which were withdrawn; where one of the several distinct charges upon which the accused had been arraigned was withdrawn pending the trial, and the accused, after a trial and finding by the court upon the other charges, was brought to trial anew upon the charge thus withdrawn; where, after proceedings commenced, but discontinued without a finding, the accused was brought to trial anew upon the same charge; where, after having been acquitted or convicted upon a certain charge which did not in fact state the real offense committed, the accused was brought to trial for the same act, but upon a charge setting forth the true offense; where the court was not sworn; where the first court was dissolved because reduced below five members by the casualties of the service pending the trial; where, for any cause, without fault of the prosecution, there was a "mistrial," or the trial first entered upon was terminated, or the court dissolved, at any stage of the proceedings before a final acquittal or conviction (Digest, p. 167, C, II, B); or, in any case, until either an acquittal has been announced in open court, or else, after conviction, the reviewing and, if there be one, the confirming authority shall have taken final action upon the case (A. W. 40), i. e., shall have ordered execution of the sentence or dismissed the case. As to new trials or rehearings see paragraphs 377 and 399, infra.

(*c*) The same acts constituting a crime against the United States can not, after the acquittal or conviction of the ac-

cused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the same or in another court, civil or military, of the same government.

Although the same act when committed in a State might constitute two distinct offenses, one against the United States and the other against the State, for both of which the accused might be tried, that rule does not apply to acts committed in the Philippine Islands. The government of a State does not derive its powers from the United States, while that of the Philippine Islands does owe its existence wholly to the United States.

A soldier in the Army, having been acquitted of the crime of homicide, alleged to have been committed by him in the Philippine Islands, by a military court-martial of competent jurisdiction proceeding under authority of the United States, can not be subsequently tried for the same offense in a civil court exercising authority in that Territory. (Grafton *v.* U. S., 206 U. S., 333.)

A similar rule applies in Alaska, Hawaii, Porto Rico, the Panama Canal Zone, or any other locality where the civil courts derive their authority from the United States.

(*d*) There can not be a second trial where the offense is really the same, though it may be charged under a different description and under a different article of war. Thus, where the Government elects to try a soldier under A. W. 61 for absence without leave, and the testimony introduced develops the fact that the offense was desertion, the accused, after an acquittal or a finally approved conviction, can not legally be brought a second time to trial for the same absence charged as desertion. (Digest, p. 169, C, II, D.) If a conviction in such a case should be disapproved before its execution was ordered, the accused could be ordered tried for desertion as well as for absence without leave on a rehearing of the case. (A. W. 40, 47, 49, 50½.)

(*e*) It is not misrepresentation or concealment by an applicant for enlistment, but the procuring of his enlistment by means of misrepresentation or concealment, together with the receipt of pay or allowances, which constitutes the mili-

tary offense of fraudulent enlistment under A. W. 54. Therefore, where a soldier was tried for and convicted of fraudulent enlistment in procuring his enlistment by means of a misrepresentation or concealment, to try him again for the same enlistment on account of another misrepresentation or concealment subsequently discovered would be a second trial for the same offense. (Digest, p. 169, C, II, E, 1.)

(*f*) The thirty-ninth article of war does not deprive a court-martial of jurisdiction of an offense after the periods prescribed. The court still has jurisdiction. The article gives the accused a right of exemption from trial if the accused claims the exemption and proves it. In other words, the exemption from trial is a defense that the accused must assert in order to take advantage of it. The defense may be made by entering a plea in bar, or it may be made after a plea of not guilty by introducing evidence showing the facts that entitle him to the exemption.

(*g*) In each case tried by general court-martial in which, upon the face of the record, it appears that the accused might successfully plead the statute of limitations but in which he has not interposed such plea, it shall be made to appear of record that the president of the court, or the law member advised the accused of his legal rights in the premises, and such advice of the president or law member and the response of the accused thereto will appear in the record. The same rule will apply in a special court-martial in any case where the evidence is made of record.

150. Pardon.—A pardon is an act of the President which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. (See Words and Phrases, vol. 6, p. 5168, and authorities there cited.)

151. Constructive Condonation.—Where a deserter has been restored to duty without trial by authority competent to order his trial, this action is regarded as a constructive condonation of the offense and may be pleaded in bar of trial subsequently ordered; unless such authority, before or at the time of such restoration, directed that he remain subject to trial for the offense.

152. (*a*) FORMER PUNISHMENT.—Former punishment, i. e., that he has already been punished for the same offense by a commanding officer, under the one hundred and fourth article of war, may be pleaded in bar of trial, and, if proven, will be a bar to further proceedings. But such punishment is not a bar to trial for another crime or offense growing out of the same act or omission. (A. W. 104: Grafton v. U. S., 206 U. S. 333, 350–351.) For instance, the fact that the accused had been so punished by his commanding officer for reckless driving resulting in a collision would not prevent his subsequent trial for involuntary manslaughter when a victim of the accident afterwards died.

(*b*) ILLEGAL ENLISTMENT.—The accused, upon arraignment, has sometimes pleaded that on account of some illegality in his enlistment, as that he was under age, or that he was enlisted for a shorter period than the law required, etc., he was not amenable to trial. But no such form of special plea is recognized in our law. If the accused, by reason of his invalid enlistment, is not duly or legally in the Army, he should regularly offer the facts in evidence under a plea to the jurisdiction or bring them out under the general issue. (Winthrop, p. 411.)

(*c*) RELEASE FROM ARREST.—Release from arrest upon the charges and restoration to duty before trial—already noticed as not a ground for a plea of pardon or condonation—is, similarly, no ground for a special plea in bar of trial.

(*d*) OTHER FORMS OF INADMISSIBLE PLEAS.—Such objections (which have been taken in some cases) as that the accused, at the time of the arraignment, is undergoing a sentence of general court-martial; or that, owing to the long delay in bringing him to trial, he is "unable to disprove the charge or defend himself"; or that his accuser is actuated by malice or is a person of bad character, are, it need hardly be said, not proper subjects for special pleas, however much they may constitute ground for continuance, or affect the questions of the truth or falsity of the charges, or of the measure of punishment. So as to all such objections as are properly matters of defense under the general issue—for

example, that the accused committed the offense charged when insane, or intoxicated, or in obedience to a military order, or under a mistake of fact or law, etc.—these are not within the scope or purpose of special pleas in bar, nor can they properly be raised in an interlocutory form, or otherwise than upon the trial and by the testimony, being, as they are, of the very substance of the defense. (Winthrop, p. 412.)

153. Action upon Special Pleas.—(*a*) Each special plea should be stated briefly and clearly. It must also be supported by evidence or legal argument to show that it is well taken. The burden of supporting a special plea by a preponderance of proof rests on the accused. Both sides should be heard and the proceedings and arguments under the plea in trial by general or special court-martial recorded. The accused may make several special pleas to any charge or specification.

(*b*) When a special plea to the jurisdiction or in bar of trial as to all the charges and specifications has been sustained by a court, the record of the proceedings as far as had will be forwarded to the reviewing authority with a statement of reasons which, in the opinion of the court, sustain its action. If the reviewing authority is in disagreement with the court in respect of the validity of the plea, the proceedings will be returned by him to the court, with reasons for such disagreement and with instructions to the court to reconvene and reconsider its action. To the extent that such pleas present issues of law, the court properly defers to the views of the reviewing authority. The order returning the proceedings for reconsideration should direct the court, upon vacating its prior action, to proceed with the trial of the case. If the reviewing authority approves the action of the court in sustaining such pleas his action will be indorsed on the proceedings and published in the final review of the case.

(*c*) If the charge and specification to which a special plea has been sustained are not capable of amendment and

there are other charges and specifications in the case, the trial may proceed on the other charges and specifications. (G. O. 28, W. D., 1905.)

(*d*) When all the special pleas to a given charge or specification are overruled, the accused must plead to the general issue as to that charge or specification.

154. PLEAS TO THE GENERAL ISSUE.—(*a*) Usually the plea of the accused is "guilty" or "not guilty" to each charge and specification; or, guilty to a specification excepting certain words, and to the excepted words not guilty; or, as when charged with an offense which includes a lesser one of a kindred nature, guilty to the specification except certain words, substituting therefor certain others, to the excepted words "not guilty," to the substituted words "guilty," and to the charge not guilty, but guilty of the lesser included offense.

(*b*) A court-martial is authorized, in any case, in its discretion, to permit an accused to withdraw a plea of not guilty and substitute one of guilty, and vice versa, or to withdraw either of these general pleas and substitute a special plea. And wherever the accused applies to be allowed to change or modify his plea, the court should, in general, consent, provided the application is made in good faith and not for the purpose of delay.

(*c*) A plea of guilty does not exclude the taking of evidence, on behalf of either the accused or the prosecution, or at the request of the court. In cases where the punishment is discretionary a full knowledge of the circumstances attending the offense is essential to the court in measuring the punishment and to the reviewing authority in acting on the sentence. In cases where the punishment is mandatory, a full knowledge of the attendant circumstances is necessary to the reviewing authority to enable him to comprehend the entire case and correctly judge whether the sentence should be approved or disapproved or clemency granted. The court should therefore take evidence after a plea of guilty, except when the specification is so descriptive as to disclose all the circumstances of mitigation or aggravation. When evidence is taken after a plea

of "guilty," the witnesses may be cross-examined, evidence may be produced to rebut their testimony, and the court may be addressed by the prosecution or defense on the merits of the evidence and in extenuation of the offense or in mitigation of punishment. After a plea of guilty the accused will always be given an opportunity to offer evidence in mitigation of the offense charged if he desires to do so.

NOTE.—It is only in very rare cases that the specification is so descriptive as to disclose all the circumstances of mitigation or aggravation. Therefore, as a rule the court will direct testimony taken after a plea of guilty.

(*d*) In each case tried by a general or special court-martial in which the accused enters a plea of guilty in whole or in part as to any charge or specification, the president or the law member of the court (see par. 89a, supra) shall explain to him as to that part:

First. The various elements which constitute the offense charged, as set forth in Chapter XVII, concerning the punitive articles of war; and

Second. The maximum punishment which may be adjudged by the court for the offense to which he has pleaded guilty.

The accused will then be asked whether he fully understands that by pleading guilty to such a charge or specification he admits having committed all the elements of the crime or offense charged and that he may be punished as stated. If he replies in the affirmative, the plea of guilty will stand; otherwise a plea of not guilty will be entered. The explanation of the president or law member of the court and the reply of the accused thereto shall appear in the record of trial by a general court-martial. The same rule will apply in cases tried by special court-martial when the evidence heard is made of record. In other trials by special court-martial, the fact of such explanation being given in the form prescribed in Appendix 9 to this Manual will be noted in the record.

NOTE.—For the form of such explanation see Appendix 9.

(*e*) When the accused pleads "guilty," and, either before or after such plea, at any time before the sentence, makes a statement or gives testimony inconsistent with his plea, the statement or testimony and plea will be considered together, and if guilt is not conclusively admitted the court will proceed to trial and judgment as if he had pleaded "not guilty." (A. W. 21.) The most frequent instances of inconsistency are in cases involving a specific intent, as in desertion, larceny, etc. In such cases, where before or after a plea of guilty the accused at any time before the sentence makes a statement, or gives testimony, the latter should be carefully scrutinized by the court, and if in the case of desertion in any part there is a statement that the accused had no intention of remaining away; that he expected to return when he had earned some money; or that when arrested he was on his way back to his organization, etc.; or that (if such be the desertion alleged) he did not intend to avoid hazardous duty or to shirk important service; or, in the case of larceny, that he intended to return the property alleged to have been stolen, etc., the court will proceed to trial and judgment as if he had pleaded "not guilty" (A. W. 21); but the criminality of an intent once formed is not affected by a subsequent change of intent.

(*f*) A plea of "guilty without criminality" is irregular and contradictory. (Winthrop, p. 414.) It is practically equivalent to a plea of "not guilty," and the court and trial judge advocate should proceed as if that plea were entered. Unless a plea of guilty is unqualified the prosecution must prove all allegations that are not specifically admitted by the accused.

(*g*) Insanity at the time of the commission of the acts charged is a defense which may be properly made under a plea of not guilty. Insanity at the time of arraignment, or at a later stage of the trial, is a proper ground for the arrest of further proceedings on the charges. (See par. 219 infra.)

Section III.

REFUSAL TO PLEAD.

155. Action.—When the accused, arraigned before a court-martial, fails or refuses to plead, or answers foreign to the purpose, or when it appears to the court that he entered a plea of guilty improvidently or through lack of understanding of its meaning and effect, the court may proceed to trial and judgment as if he had pleaded not guilty. (A. W. 21.) If the court finds that the failure to plead is the result of insanity, it will proceed as indicated in Section II, paragraph 154 (*g*), supra, and in paragraph 219, infra.

Section IV.

MOTIONS AND OTHER INCIDENTS OF THE TRIAL.

156. Motion to Sever.—A motion to sever is a motion by one of two or more joint accused to be tried separately from the other or others. It will regularly be made at the arraignment. Except where the essence of the charge is combination between the parties (as in mutiny), the motion may properly be granted for good cause shown. The more common grounds of motions for severance are that the mover desires to avail himself on his trial of the testimony of one or more of his coaccused, or of the testimony of the wife of one, or that the defenses of the other accused are antagonistic to his own, or that the evidence as to them will in some manner prejudice his defense. This motion has rarely been presented to the court in our military practice. Where the prosecution desires to use one of two or more joint accused as a witness against another or others, the practice is not to move to sever, but, by order of the convening authority, to withdraw charges as to such one. (See Winthrop, p. 379, and authorities there quoted.)

157. Motion to Elect.—The prosecution is at liberty to charge an act under two or more forms, where it is doubtful under which it will more properly be brought by the testimony. In the military practice the accused is not entitled

to call upon the prosecution to "elect" under which charge it will proceed in such, or indeed in any, case. (Digest, p. 504, V, F.)

158. NOLLE PROSEQUI.—A nolle prosequi is a declaration of record on the part of the prosecution that it withdraws a charge or specification from the investigation and will not pursue the same further at the present trial. This authority can only be exercised by the superior who, as the representative of the United States, ordered the court, and in a proper case he may, on his own initiative or on application duly made to him, instruct the trial judge advocate to enter a nolle prosequi. The principal grounds for this proceeding when duly authorized will be—

(*a*) The fact that the charge or specification is discovered to be substantially defective and insufficient in law, or

(*b*) That it is ascertained that the allegations can not be proved, or

(*c*) That the testimony available is not sufficient to sustain them, or

(*d*) That the criminality of one of the accused, where there are several, can not be established, or

(*e*) That it is proposed to use one of the accused as a witness.

The withdrawal of such a charge or specification is not in itself equivalent to an acquittal or to a grant of pardon and can not be so pleaded. It simply removes from the pending case a particular charge or specification without prejudice to its being subsequently renewed in its original or a revised form. In court-martial practice when authorized by the appointing authority a nolle prosequi may be entered either before or after arraignment and plea. If after arraignment it is found that a charge or specification can not be sustained or it is determined for other reasons that the same shall not be pursued, while it would be legal to enter a nolle prosequi thereto (see form, Appendix 10), it will be the preferable course as well as most just to the accused not to do so, but to allow the accused to be formally acquitted thereon at the finding. (See Winthrop, pp. 369–371.)

158a. Aider of Defective Specification.—If a specification, while defective because of failure to allege some particular fact or element essential to the offense, nevertheless contains sufficient fairly to apprise the accused of the offense intended to be charged, then, if at the time of arraignment, there be no objection to the specification on the ground of such omission, and if either (1) the accused pleads not guilty thereto and the record shows that the omitted fact or element has been proved at the trial without objection by the defense, or (2), upon the accused's plea of guilty to such specification, the president (or the law member of a general court) explains to the accused the various elements which constitute the offense charged therein in accordance with the requirements of paragraph 154d, supra, and in such explanation states and includes such omitted fact or element as one of the elements of the crime or offense charged, which the accused, by pleading guilty to such specification, admits having committed, then, in either such case, a finding of guilty will cure such defect in the specification, and neither the finding nor sentence need be disapproved by reason of such defect; unless it appears from the record that the accused was in fact misled by such failure, or that his substantial rights were in fact otherwise injuriously affected thereby; or unless the existence of such omitted fact or element is negatived by the language of the defective specification or by the language of some other specification.

If, at the arraignment, or at any time during the trial, the accused objects to the sufficiency of the specification on the ground of the omission therefrom of such essential fact or element, or objects to evidence offered as to such omitted fact or element, on the ground that it is not alleged in the specification, or in case such defect is brought to the attention of the court in any other manner, the court will either (1) direct that specification to be stricken out and disregarded, or else (2) the court may, in its discretion, either on motion of the trial judge advocate or upon its own motion, continue the case to allow the trial judge advocate to apply to the convening authority for directions as to further proceedings in the case (see par. 158d, infra), or may (3) permit the specification to be so amended as to cure such omission, and continue the case for such time, as in the

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opinion of the court may suffice to enable the accused properly to prepare his defense in view of the amendment (provided, however, that the court may proceed immediately with the trial upon such amendment being made, if it clearly appears from all the circumstances before the court that the accused has not in fact been misled in the preparation of his defense, and that a continuance is not necessary for the protection of his substantial rights).

158b. Variance.—If at any time during the trial it appears to the court that the evidence as to any specification or charge is not legally sufficient to sustain a finding of guilty thereof or of any lesser included offense thereunder, but that there is substantial evidence, either before the court or offered, tending to prove the guilt of the accused of some other offense not alleged in any specification or charge before the court, the court may in its discretion, instead of proceeding with the trial upon the pleadings as they stand, either—

1. Direct that the specification or charge in question be stricken out and disregarded; or
2. Continue the case pending an application by the trial judge advocate to the convening authority for directions as to further proceedings in the case. (See par. 158d, infra.)

158c. Finding of Not Guilty at the Close of the Case for the Prosecution.—Upon the close of the case for the prosecution and before the opening of the case for the defense, or the introduction of any evidence for the defense or statement by the accused, or at any time thereafter during the trial, before the close of the evidence, the court may, either upon its own motion or upon the suggestion of the trial judge advocate or upon suggestion or motion by the accused or his counsel, consider whether the evidence introduced by the prosecution, or before the court, is legally sufficient to support a finding of guilty, either as to all of the specifications and charges before the court, or as to any particular one or more thereof. And if it thereupon appears to the court that the evidence then before the court in favor of the prosecution, if that most favorable to the prosecution should all be accepted as true (regardless of any question of veracity of the witnesses or of the chances of its being successfully con-

troverted or explained by the defense) with all the inferences in favor of the prosecution that may reasonably be drawn therefrom, is not legally sufficient to sustain the specifications and charges, or any particular one or more thereof (that is, if there is no substantial evidence fairly tending to prove each of the essential facts and elements therein alleged), then, in any such case, the court may in its discretion forthwith direct and announce in open court a finding of not guilty, either of all the specifications and charges, or of such particular specifications or charges, if any, as the court shall so find not to be supported by legally sufficient evidence. Every such question will be determined purely as a question of law, without any consideration of the weight of the evidence before the court or any part thereof; and such question will be determined, in the first instance, by the law member of the court, if any, or if there be no law member of the court, or he be not present, then by the president, by his ruling in open court upon the question (A. W. 31); but if any member of the court object to such ruling the court will be cleared and closed and the question decided by a majority vote by secret ballot, as provided by the thirty-first article of war; but a denial of such motion shall never be regarded as ground, in itself, of disapproving a finding or sentence.

158d. Convening Authority.—Action when Court-Martial Requests Directions.—Whenever a trial judge advocate, by the directions of a court-martial, under the provisions of paragraph 158a or of paragraph 158b, supra, or under any other paragraph of this Manual, or otherwise, applies to the convening authority for directions as to further proceedings in a case, the convening authority will refer the matter to his staff judge advocate for consideration and advice, who will report to him thereon in accordance with the provisions of paragraph 76b, supra. The convening authority will thereupon take such action as may appear to him to be proper under the circumstances of the case.

CHAPTER X.

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Section I.

ATTENDANCE OF WITNESSES.

159. Process to Obtain Witnesses.—Every trial judge advocate of a general or special court-martial and every summary court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of the United States having criminal jurisdiction may lawfully issue; but such process shall run to any part of the United States, its Territories, and possessions. (A. W. 22.) The authority to issue such process is in terms vested solely in the trial judge advocate of a general or special court-martial and in a summary court-martial, and it is by them alone that the process can be initiated. The trial judge advocate, however, will sometimes properly consult the court as to the desirability of resorting to an attachment, especially where any considerable time may be required for the service and return of the same, and an unusual adjournment may thus be necessitated. He will also properly resort to it whenever the court in its desire to secure the best or material evidence not otherwise procurable calls upon him for the purpose. (Winthrop, p. 298.)

It is the duty of the trial judge advocate to issue process to compel the attendance of witnesses desired on behalf of the defense upon the request of the defense counsel or of other counsel for the accused, but he may properly consult the court as to the desirability of resorting to an attachment for such purposes where any considerable time may be required for the service and return of the same and an unusual adjournment may thus be necessitated, if the evidence desired by the accused can be ob-

tained in another manner, or if the trial judge advocate is willing to admit that the absent witness or witnesses, if present, would testify as stated by the accused. (See par. 140, supra.)

NOTE 1.—For power to issue process to secure the attendance and testimony of witnesses before courts-martial in the National Guard not in the service of the United States, see section 108, National Defense Act of June 3, 1916, 39 Stat. 209, Appendix 2.

2. Wherever in this section reference is made to issue of such process by a trial judge advocate, a summary court-martial will be understood to be included.

3. An admission that an absent witness would, if present, testify in a particular manner does not admit the fact to be as the witness would testify. The admission simply stands in the place of the testimony of the witness and may be attacked or contradicted or explained in the same way as though the witness had been sworn and had testified to the things covered by the admission.

4. The admission of the truth of a statement or of the existence of a fact is a wholly different thing.

160. SERVICE OF SUBPŒNA.—A subpœna for the attendance of a civilian witness is issued in duplicate. It may be legally served by either a person in the military service or a civilian. Usually service is made by an officer or noncommissioned officer. Service is made by personal delivery of one of the copies to the witness. The proof of service is made by indorsing on the remaining copy a sworn statement that service was made. (For service by mail and acceptance of same, see par. 164, infra.) After making service a copy of the subpœna will be promptly returned to the trial judge advocate of the court with the proof of service. If the witness can not be found, the trial judge advocate should be promptly so informed. A trial judge advocate can not subpœna a civilian witness to appear before himself for preliminary examination.

NOTE.—For form and subpœna and proof of service, see Appendix 19.

161. SUMMONING OF WITNESSES.—The trial judge advocate will summon the necessary witnesses for the trial, but will not summon witnesses at the expense of the Government without the order of the court, unless satisfied that their testimony is material and necessary. In order that the accused may not be denied a full opportunity to make

his defense any witness requested by him is usually summoned, and any witness designated by the defense counsel of a general or special court-martial will be summoned. But a reasonable discretion should be exercised by the defense counsel where the summoning of the number of witnesses requested by the accused or by individual counsel would result in an unreasonable inconvenience or expense to the Government. In such instances the defense counsel should ascertain whether the testimony required of the witness is not merely cumulative, or as to an unimportant point that one or two witnesses would be sufficient to render conclusive, or as to which the trial judge advocate will consent to admit the facts expected from the witness's testimony.

162. Advance Notice to Witnesses.—The trial judge advocate will endeavor to issue subpœnas to civilian witnesses and to make request for the attendance of military witnesses at such time as will give each witness at least 24 hours' notice before starting to attend the meeting of the court.

163. Attendance of Military Witnesses.—The attendance of persons in the military service stationed at the place of meeting of the court, or so near that no expense of transportation will be involved, will ordinarily be obtained by informal notice served by the trial judge advocate on the person concerned that his attendance as a witness is desired. If for any reason formal notice is required, the trial judge advocate will request the proper commanding officer to order him to attend, but if mileage is involved the area or department commander or other proper superior will be requested to issue the necessary order. Fees will not be paid to military witnesses on the active list, and they are entitled only to the mileage allowances due them under their travel orders. The attendance as witnesses of persons on the retired list (not assigned to active duty) should be obtained in the same manner, and they are entitled to the same fees and mileage as civilian witnesses not in the Government employ. No travel order will be issued in such cases.

164. Procedure to Secure Attendance of Civilian Witness.—Unless he has reason to believe that a formal service of subpœna will be required, the trial judge advocate will

endeavor to secure the attendance of a civilian witness by correspondence with him, sending him duplicate subpœna properly filled out, with a request to accept service on one by signing the printed statement, "I hereby accept service of the above subpœna," and to return same to the trial judge advocate, for which purpose a return addressed penalty envelope should be inclosed. Ordinarily there will be no difficulty in securing the voluntary attendance of a civilian witness if he is informed that his fees and mileage will not be reduced by reason of his voluntary attendance and that a voucher for his fees and mileage going to and returning from the place of the sitting of the court-martial will be delivered to him promptly on being discharged from attendance on the court. If such informal methods are ineffective, formal duplicate subpœna will be issued by the trial judge advocate with a view to service on the witness. If the witness is at or near the post where the court is sitting, the service will be by the trial judge advocate or by some person designated by him. If the witness is not at or near the post where the court is sitting, but is at or near another military post, command, or detachment, the trial judge advocate will send the duplicate subpœna direct to the commanding officer of such post, command, or detachment, requesting service of the same. Upon receipt of the request the officer receiving it will serve the subpœna or cause it to be served. The service will be made without delay, and the retained copy of the subpœna, with proof of service indorsed on it, will be sent at once direct to the trial judge advocate. If in any instance travel is necessary to serve the subpœna, a request will promptly be made by the commanding officer of the post, command, or detachment on the proper authority for travel orders. If the witness does not reside near a post, command, or detachment, the subpœna will be sent direct to the area or department or other proper commander requesting service of the same. (See par. 159, notes, supra.)

165. When Accused Must Be Confronted With Witness.—Depositions can not be introduced by the prosecution in capital cases. (A. W. 25.) (As to what are capital cases, see par. 41, supra.) In such cases, therefore, as well as in

others in which the trial judge advocate or the defense counsel believes that the interests of justice demand that the accused be confronted by a witness against him, or believes that for any reason a witness should testify in the presence of the court, the trial judge advocate will take the necessary steps to secure the attendance of such witness or witnesses.

NOTE.—A case referred to a special court-martial for trial, under the provisions of the last proviso of A. W. 12 as amended by the code of 1920, is not a "capital case" within the meaning of this paragraph, since a special court-martial has no power to impose the death penalty.

166. Procedure to Obtain Books, Documents, or Papers.—If a civilian has in his possession a book, document, or paper desired to be introduced in evidence, a subpœna duces tecum will be prepared and issued by the trial judge advocate directing the person to appear in court and to bring with him such book, document, or paper, which should be described in sufficient detail to enable it to be readily identified.

Note.—For form, see Appendix 19.

167. Civilian Witness in Confinement.—The testimony of a witness who is in confinement in the hands of the civil authorities will ordinarily be obtained by means of a deposition (A. W. 25), but if for any reason it is necessary that such a witness testify in court, an endeavor should be made by the trial judge advocate to make arrangements with the civil authorities to obtain his appearance.

168. Warrant of Attachment.—In view of the provisions of A. W. 23 providing for the punishment on information before a district court of the United States or in a court of original criminal jurisdiction in any of the territorial possessions of the United States of a civilian who willfully neglects or refuses, after he has been duly subpœnaed, to appear as a witness before any military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before such court, commission, court of inquiry, or board, circumstances requiring the issue of a warrant of attachment will be very rare. (For form, see Appendix 20.) When-

ever it becomes necessary to issue a warrant of attachment, the trial judge advocate or summary court-martial will direct or deliver it for execution to an officer designated by the area or department commander for the purpose. (12 Op. Atty. Gen., 501.) As the arrest of a person under a warrant of attachment involves depriving him of his liberty, the authority for such action may be inquired into by a writ of habeas corpus. For this reason the officer executing the warrant of attachment should be provided with the following papers to enable him to make a full return in case a writ of habeas corpus is served upon him:

(*a*) A copy of the charges in the case, sworn to be a full and true copy of the original by the trial judge advocate of the court (or summary court-martial).

(*b*) A copy of the order appointing the court-martial, sworn to be a full and true copy of the original by the trial judge advocate of the court (or summary court-martial).

(c) A copy of the order referring the charges to the court for trial, sworn to be a full and true copy of the original by the trial judge advocate (or summary court-martial).

(*d*) The original subpœna, showing proof of service of same.

(*e*) An affidavit of the trial judge advocate or summary court-martial that the person being attached is a material witness in the case; that he has failed and neglected to appear, although sufficient time has elapsed for that purpose; and that no valid excuse has been offered for such failure to appear.

(*f*) The original warrant of attachment.

In executing such process it is lawful to use only such force as may be necessary to bring the witness before the court. Whenever force is actually required, the post commander nearest the residence of the witness will furnish a military detail sufficient to execute the process.

169. Habeas Corpus Proceedings in Connection with Attachments.—(*a*) If, in executing a warrant of attachment, the officer detailed for that purpose should be served with a writ of habeas corpus from any United States court, or by a United States judge, for the production of the wit-

ness, the writ will be promptly obeyed, and the person alleged to be illegally restrained of his liberty will be taken before the court from which the writ has issued and a return made setting forth the reasons for his restraint. The officer upon whom such a writ is served will at once report by telegraph the fact of such service direct to The Adjutant General of the Army and to the commanding general of the division, force, area, or department. (See Appendix 22, Form A.)

(*b*) If, however, the writ of habeas corpus is issued by any State court (or a State judge), it will be the officer's duty to make respectful return, in writing, informing the court that he holds the person named in the writ by authority of the United States pursuant to a warrant of attachment issued under Chapter II of the act of Congress approved June 4, 1920 (A. W. 22), by a trial judge advocate of a lawfully convened general or special court-martial (or by a summary court-martial), and that the Supreme Court of the United States has decided that State courts and judges are without jurisdiction in such cases. (See Appendix 22, Form B.) After having made the above return to a writ issued by a State court or judge, it is the duty of the officer to hold the prisoner in custody under his warrant of attachment and to refuse obedience to the mandate or process of any government except that of the United States. Consequently, it is his duty not to take the prisoner, nor suffer him to be taken, before a State judge or court upon a writ of habeas corpus issued under State authority.

170. Punishment for Refusal to Appear or Testify.—Although the attendance of a witness as above described can be enforced, there is no power in a court-martial itself to compel a witness to testify or to punish him for not testifying. The only procedure is that provided in A. W. 23, as follows:

Every person not subject to military law, who being duly subpœnaed to appear as a witness before (*a*) any military court, commission, court of inquiry, or board, or (*b*) any officer, military or civil, designated to take a deposition to be read in evidence before such court, commission, court of inquiry, or board, willfully (*a*) neglects or refuses to appear,

or (*b*) refuses to qualify as a witness or to testify, or (*c*) produce documentary evidence which such person may have been legally subpœnaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States, or in a court of original criminal jurisdiction in any of the Territorial possessions of the United States, jurisdiction being hereby conferred upon such courts for such purpose; and it shall be the duty of the United States district attorney or the officer prosecuting for the Government in any such court of original criminal jurisdiction, on the certification of the facts to him by the military court, commission, court of inquiry, or board, to file an information against and prosecute the person so offending, and the punishment of such person, on conviction, shall be a fine of not more than $500, or imprisonment not to exceed six months, or both, at the discretion of the court: *Provided*, That the fees of such witness and his mileage, at the rates allowed to witnesses attending the courts of the United States, shall be duly paid or tendered said witness, such amounts to be paid out of the appropriation for the compensation of witnesses. (A. W. 23.)

NOTE.—If an officer who is charged with serving a subpœna pays the necessary fees and mileage to a witness, taking a receipt therefor, he is entitled to reimbursement. (Dec. Comp. Treas., Sept. 10, 1901, published in Cir. 38, A. G. O. 1901.)

171. SAME IN PHILIPPINE ISLANDS.—Every person not belonging to the Army of the United States, who, in the Philippine Islands, being duly subpœnaed to appear therein as a witness before a general court-martial of said Army (or naval court), willfully neglects or refuses to appear, or refuses to qualify as a witness, or to testify, or produce documentary evidence, which such person may have been legally subpœnaed to produce, shall be punished by a fine of not more than $500 United States currency, or imprisonment not to exceed six months, or both, at the discretion of the court, and it shall be the duty of the proper fiscal or prosecuting officer, on the certification of the facts to him by the general court-martial, to file in the proper court a complaint against and prosecute the person so offending: *Provided*, That $1.50 United States currency for each day's attendance, and 5 cents

United States currency per mile for going from his residence to the place of trial or hearing, and 5 cents per mile for returning, shall be duly tendered to said witness: *Provided further*, That no witness shall be compelled to incriminate himself or to answer any question which may tend to incriminate him. (Acts 1130 and 1243, P. I. Commission.) The provisions of this paragraph do not apply to witnesses before special and summary courts.

NOTE.—Employees of the civil government of the Philippine Islands, paid from insular funds of the islands, are held not to be in the employ of the United States. (Dec. Comp. Treas., Aug. 20, 1902, published in Cir. 45, A. G. O., 1902.)

172. TENDER OF FEES PRELIMINARY TO PROSECUTION.—In case a civilian witness is duly subpœnaed under the authority of A. W. 22 and willfully neglects or refuses to appear or refuses to qualify as a witness, or to testify or produce documentary evidence which he may have been legally subpœnaed to produce, he will at once be tendered or paid by the nearest finance officer one day's fees and mileage for the journeys to and from the court, and will thereupon be again called upon to comply with the requirements of the law. Upon failing the second time to comply with the requirements of the law a complete report of the case will be made to the officer exercising general court-martial jurisdiction over the command with a view to presenting the facts to the Department of Justice for the punitive action contemplated in A. W. 23.

173. CONTEMPTS.—(*a*) *Authority to Punish.*—A military tribunal may punish, as for contempt, any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder: Provided, That such punishment shall in no case exceed one month's confinement, or a fine of $100, or both. (A. W. 32.) The power to so punish is vested in general, special, and summary courts-martial. Punishments adjudged for contempt, like other punishments adjudged by courts-martial, require the approval of the reviewing authority in order to be effective.

(*b*) *Persons Who May Be Punished for Contempt.*—The words "any person," as used in A. W. 32, appear to include

civilians as well as military persons. In view, however, of the embarrassment liable to attend the execution, through military machinery, of a punishment adjudged against a civilian for a contempt under the article, it would generally be advisable for the court to confine itself to causing the party to be removed as a disorderly person, and, in an aggravated instance, to procure a complaint to be lodged against him for breach of the public peace. (Winthrop, p. 462.)

(*c*) *Direct and Constructive Contempts.*—A direct contempt is one committed in the presence or immediate proximity of a court while it is in session. An indirect or constructive contempt is one not so committed. The conduct described in A. W. 32 constitutes direct contempt. But conduct on the part of a person subject to military law and amounting to a constructive contempt may be punished like any other conduct that is prejudicial to good order and military discipline, by bringing the person to trial before another court on charges under A. W. 96.

Constructive contempts by civilians are punishable as "offenses against public justice," under A. W. 23, by proper proceedings in the United States courts. In such cases it is the duty of the trial judge advocate of a general or special court-martial, or of the summary court, to place the facts before the nearest United States district attorney.

(*d*) *Procedure.*—Where a contempt within the description of A. W. 32 has been committed and the court deems it proper that the offender shall be punished, the proper course is to suspend the regular business and, after giving the party an opportunity to be heard in explanation, to proceed, if the explanation is insufficient, to impose a punishment, resuming thereupon the original proceedings. The action taken is properly summary, a formal trial not being called for. Close confinement in quarters or in the guardhouse during trial of the pending case or forfeiture of a reasonable amount of pay, has been the more usual punishment. A full record of the proceeding is at once made, not separate from, but in and as a part of the regular record of the case on trial, showing the occasion and circumstances of the contempt, the words or acts which constituted it, the excuse

or statement, if any, of the party, the action taken by the court, its judgment and the disposition of the offender. (Winthrop, p. 469.) Instead of proceeding against a military person for contempt in the manner contemplated by this article, the alternative course may be pursued of bringing him to trial before a new court on a charge of a disorder under A. W. 96.

Section II.

DEPOSITIONS.

174. When Admissible.—A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, if such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or District in which the court, commission, or board is ordered to sit, or beyond the distance of 100 miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to appear and testify in person at the place of trial or hearing: *Provided*, That testimony by deposition may be adduced for the defense in capital cases. (A. W. 25.)

Note.—For form for interrogatories and depositions, see Appendix 17.

174a. Depositions upon Oral Interrogatories.—If reasonably practicable, and upon request of the accused or his counsel, or of the trial judge advocate, or upon the direction of the court, commission, or board, depositions may be taken upon oral interrogatories and reduced to writing in the manner prescribed in paragraph 181½, infra, and may be read in evidence in the same manner and for the same purposes in like cases as depositions taken upon written interrogatories under paragraphs 176 and 177 of this Manual.

175. Before Whom Taken.—Depositions to be read in evidence before military courts, commissions, courts of in-

quiry, or military boards, or for other use in military administration, may be taken before and authenticated by any officer, military or civil, authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths. (A. W. 26.)

176. Interrogatories, How Submitted.—The procedure for submitting interrogatories for a deposition is as follows:

(*a*) The party desiring the deposition submits to the opposite party the interrogatories which he wishes propounded to the person whose deposition he desires, and the opposite party then submits to him such cross-interrogatories, if any, as he may desire. Such additional direct and cross-interrogatories may be submitted as desired; or

(*b*) The party desiring the deposition submits to the court, military commission, or board the interrogatories which he wishes propounded to the person whose deposition he desires. The opposite party then submits to the court, military commission, or board such cross-interrogatories, if any, as he may desire. The court, military commission, or board then submits such additional interrogatories as it may deem proper and desirable, and such additional direct and cross-interrogatories may be submitted as are desired.

(*c*) Where the court, military commission, or board desires that the deposition of a particular person be obtained, it will cause interrogatories to be prepared accordingly. The prosecution and defense (or other party or parties in interest) then submit such interrogatories as they may desire. Such additional interrogatories may be included as are desired by the court, military commission, or board, or by a party in interest.

177. Procedure to Obtain Deposition.—(*a*) All the interrogatories to be propounded to the person are entered upon the form of interrogatories and deposition, and the trial judge advocate, summary court, or recorder will take appropriate steps to cause the desired deposition to be taken with the least practicable delay. In an ordinary case he will either send the interrogatories to the commanding officer of the post, recruiting station, or other military command at or nearest which the person whose deposition is desired is stationed, resides, or is understood to be, or will send them

to some other responsible person, preferably a person competent to administer oaths, at or near the place at which the person whose deposition is desired is understood to be. In a proper case the interrogatories may be sent to the division, area, or department or other superior commander or to the witness himself, and in any case they will, when necessary, be accompanied by a proper explanatory letter.

(*b*) When interrogatories are received by a commanding officer, he will either take or cause to be taken the deposition thereon. He will send an intelligent person—preferably an officer, if available, or a person with legal training or experience if available, accompanied if practicable by a military stenographic reporter or stenographer—to the necessary place for the purpose of obtaining the deposition, or he may properly arrange by mail or otherwise that the deposition be taken, if he can make such arrangements as to assure himself that the work will thus be properly done. The deposition will be taken with the least practicable delay, and when taken will be sent at once direct to the trial judge advocate of the court-martial trying the case, or other proper person.

(*c*) If the witness whose deposition is desired is a civilian, the trial judge advocate or other proper person sending interrogatories as above will inclose with them a prepared voucher for the fees and mileage of the witness, leaving blank such spaces provided therein as it may be necessary to leave blank, accompanied by the required number of copies of the orders appointing the court, military commission, or board. The trial judge advocate, summary court, or recorder will also send with the interrogatories duplicate subpœna requiring the witness to appear in person at a time and place to be fixed by the officer, military or civil, who is to take the deposition. If the name of this officer is not known, the space provided for it will be left blank. If a military officer takes the deposition, he will complete the witness voucher, certify it, and transmit it to the nearest disbursing finance officer for payment. When the deposition is to be taken by a civil officer he will be asked to obtain and furnish to the military officer requested or designated to cause the deposition to be taken the necessary data for the

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completion of the witness voucher, and the latter will complete the voucher, certify it, and transmit it to the nearest disbursing finance officer for payment.

In the case of a military witness subpœna will not accompany the interrogatories, but the officer before whom the deposition is to be taken will take the necessary steps to have the witness appear at the proper time and place.

178. Tracing Delayed Depositions.—Trial judge advocates and defense counsel will be prompt in preparing and forwarding interrogatories. If the deposition is not received within a reasonable time, a letter of inquiry will be sent; and, if a prompt explanation of the delay is not received, the area or department commander or other proper superior will be advised.

179. Designation of Deponent by Official Title.—Where it is desired to take the deposition of some person holding a certain office or position, as, for instance, a troop commander, master sergeant, first sergeant, cashier of a bank, post exchange officer, etc., and the name of the person is unknown, interrogatories may be prepared in the usual way for submission to the person holding the office or position, without naming him unless it shall appear that the accused will be prejudiced thereby.

180. Deponent's Answers to be Responsive.—Before a witness gives his answers to the interrogatories they should be read and, if necessary, be explained to him, or he should be permitted to read them over in order that his answers may be clear, full, and to the point. The person taking the deposition should not advise the witness how he should answer, but he should endeavor to see that the witness understands the questions and what is desired to be brought out by them, and that his answers are clear, full, and to the point.

181. Fees for Taking Depositions.—Civil officers before whom depositions are taken for use before courts-martial will be paid the fees allowed by the law of the place where the depositions are taken.

181½. Depositions upon Oral Interrogatories—Procedure.—The procedure for procuring depositions upon oral interrogatories is as follows:

(a) The party desiring the deposition on oral interrogatories will so notify the opposite party, and also the court, commission, or board, in writing, and may at the same time outline the subject upon which he desires the witness interrogated and the main questions which he wants propounded to him, at the same time attaching a copy of the charges and specifications (or, in case of a court of inquiry or other board, a brief statement of the matter under investigation) so as to better enable the counsel examining the witness to cover all the ground and intelligently interrogate the witness upon the points upon which information is desired. The opposite party may thereupon submit within 24 hours, if so desired, an outline of the points upon which he particularly desires the witness cross-examined with the main cross-interrogatories to be propounded. The court, board, or commission may, if it desires, similarly outline any matter or questions upon which, on its behalf, the witness shall be interrogated.

(b) Where the court, commission, or board desires the deposition of a witness taken on its behalf, on oral interrogatories, the same procedure will be followed; i. e., all parties will be given an opportunity to participate in the deposition in the manner hereinbefore prescribed.

(c) Such notice and all the accompanying papers, as prescribed in the preceding subparagraph, including such charges (or subject matter to be investigated by a court of inquiry or board, as the case may be), will be sent by the trial judge advocate, summary court, recorder, or board to the commanding officer of the post, recruiting station, or other military command at or nearest which the person whose deposition is desired is stationed, resides, or is understood to be. In case the witness is a civilian, the papers will be accompanied by a subpœna and a prepared voucher for his or her signature for witness fees and mileage. Where requests for depositions upon oral interrogatories are sent to a commanding officer, such officer will cause the deposition to be accomplished in the presence of a summary court or other officer, civil or military, authorized by law to administer oaths; and an available trial judge advocate of a general or special court-martial will ordinarily be detailed to represent the United States, and available defense counsel of a

general or special court-martial to represent the accused; but if there be no such trial judge advocate or assistant or defense counsel or assistant available, some other suitable person will be designated; and in no case will an accused be deprived of the right to be represented by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available. A military stenographer will, if practicable, be detailed to take down and transcribe the deposition. In propounding questions to the witness such trial judge advocate and defense counsel (or other counsel retained or appointed or detailed for such duty) will be careful to cover all the matters set out in the outlines of the subjects upon which the witness is to be interrogated, and to propound all the questions submitted by the parties whom they represent, respectively (the trial judge advocate acting also for the court, commission, or board in so interrogating the witness), and such additional questions as may in the interests of justice appear desirable, having due regard for the rules of evidence applicable before courts-martial. (For method of completion and authentication, see form, Appendix 17.)

(d) The summary court officers, trial judge advocates, and defense counsel called upon to take part in taking depositions upon oral interrogatories hereunder will use their best efforts to obtain from the witness the same results as though he had been interrogated in the ordinary way in open court, and in no case will such duty be permitted to be performed in a perfunctory manner.

(e) Upon receipt of the accomplished deposition and signed vouchers, the trial judge advocate, summary court, or recorder will complete and certify such vouchers and send them to the nearest finance office for payment.

182. Taking Depositions in Foreign Country.—If the evidence desired from a witness residing in a foreign country is necessary and material and is desired to be read before a court-martial, military commission, court of inquiry, or military board sitting within any of the States of the Union or the District of Columbia, interrogatories (accompanied by the necessary vouchers for fees and mileage) will ordi-

narily be forwarded through military channels to The Adjutant General of the Army. They will then be transmitted by the Secretary of War to the Secretary of State, with the request that they be sent to the proper consul of the United States and the deposition of the witness be taken. In the case of troops serving along the international boundaries, outside of the United States proper, or in foreign countries, the officer exercising general court-martial jurisdiction may, in his discretion, detail an officer to take the deposition of a civilian witness, or he may send the interrogatories direct to the consul of the United States nearest the place of residence of the witness with the request that the deposition be taken. In the latter case the interrogatories will be accompanied by the proper vouchers for the fees and mileage of the witness.

NOTE.—For use of depositions as evidence, see Chapter XI, Evidence.

SECTION III.

FEES, MILEAGE, AND EXPENSES OF WITNESSES.

183. OFFICERS AND SOLDIERS, ACTIVE OR RETIRED.—Officers and soldiers on the active list required to attend a court-martial as witnesses are not entitled to receive mileage and fees like civilian witnesses, but are entitled to such travel allowances as the law allows to officers and soldiers traveling under orders; but a retired officer, not assigned to active duty, or a retired soldier is entitled to the per diem and mileage provided for civilian witnesses not in Government employ.

NOTE.—The fees, mileage, and expenses of persons in the military service or of civilians in the Government employ duly subpœnaed and appearing before civil courts, whether State or Federal, are payable by the civil authorities.

184. CIVILIANS IN GOVERNMENT EMPLOY.—Civilians in the employ of the Government when traveling upon summons as witnesses before military courts are entitled to transportation in kind from their place of residence to the place where the court is in session and return. If no transportation be furnished they are entitled to reimbursement of the cost of travel

actually performed by the shortest usually traveled route, including transfers to and from railway stations, at rates not exceeding 50 cents for each transfer, and the cost of sleeping-car accommodations to which entitled or steamer berth when an extra charge is made therefor. They are also entitled to reimbursement of the actual cost of meals and rooms at a rate not exceeding $3 per day for each day actually and unavoidably consumed in travel or in attendance upon the court under the order or summons. No allowance will be made to them when attendance upon court does not require them to leave their stations.

185. Civilians Not in Government Employ.—A civilian not in Government employ duly summoned to appear as a witness before a military court, commission, or board, or at a place where his deposition is to be taken for use before such court, commission, or board, will receive $1.50 for each day of his actual attendance before such court, commission, or board, or for the purpose of having his deposition taken, and 5 cents a mile for going from his place of residence to the place of trial or of the taking of his deposition, and 5 cents a mile for returning, except as follows:

(*a*) In Porto Rico and Cuba he will receive $1.50 a day while in attendance as above stated and 15 cents for each mile necessarily traveled over stage line or by private conveyance and 10 cents for each mile over any railway or steamship line.

(*b*) In Alaska, east of the one hundred and forty-first degree of west longitude, he will receive $2 a day while in attendance as above stated and 10 cents a mile, and west of said degree $4 a day and 15 cents a mile.

(*c*) In the States of Wyoming, Montana, Washington, Oregon, California, Nevada, Idaho, Colorado, Utah, New Mexico, and Arizona, he will receive $5 a day for the time of actual attendance as above stated, and for the time necessarily occupied in going to and returning from the same, and 15 cents for each mile necessarily traveled over any stage line or by private conveyance and 5 cents for each mile by any railway or steamship.

Note.—1. Travel must be estimated by the shortest usually traveled route—by established lines of railroad, stage, or steamer—the time

occupied to be determined by the official schedules, reasonable allowance being made for unavoidable detention.

2. These rates apply to the Philippine Islands. (See Cir. 45, A. G. O., 1902.)

3. A civilian not in Government employ, when furnished transportation on transport or other Government conveyance, is entitled to 57.142 per cent of 5 cents per mile (equal to 2.857 cents per mile). (Comp. Dec., Aug. 20, 1902, published in Cir. 45, A. G. O., 1902.)

186. Payment for Return Journey.—The charges for return journeys of witnesses will be made upon the basis of the actual charges allowed for travel to the place of giving testimony, and the entire amount thus completed will be paid upon discharge from attendance, without waiting for completion of return travel.

187. Contents of Vouchers.—The items of expenditure authorized for civilian witnesses will be set forth in detail and made a part of each voucher for reimbursement. No other items will be allowed.

The certificate of the trial judge advocate, or other officer, will be evidence of the fact and period of attendance, and will be made upon the voucher.

When payment is made under the provisions of paragraph 184, the correctness of the items will be attested by the affidavit of the witness, to be made, when practicable, before the officer who certifies the voucher.

188. Witness in Several Trials on Same Day.—A civilian attending as a witness in several court-martial trials on the same day is entitled to a separate fee for attendance in each case (Dig. Dec. Comp., 1894 to 1902, p. 476), but will receive mileage in only one case.

189. Voucher to be Delivered to Witness.—A civilian witness not in Government employ who appears to testify is entitled, upon his discharge from attendance, to receive from the trial judge advocate, if any (or summary court, recorder of court of inquiry or board, etc.), his witness voucher properly filled out. If not practicable to deliver to the witness his voucher at that time, his address will be obtained and his witness voucher will be promptly forwarded to the nearest disbursing finance officer. To entitle a witness to the payment of fees and mileage it is not essential that he should produce a subpœna.

190. Lost Voucher.—Where the voucher of a witness has been lost, a new voucher may be issued by the trial judge advocate upon a satisfactory showing of such loss, supported by affidavit. The new voucher should be so noted as to indicate its character and should be forwarded to the Chief of Finance for settlement.

191. Fees for Service of Subpœna.—There is no fee or compensation fixed by statute or regulation for the service of subpœna to secure the attendance of witnesses before military courts. Ordinarily service will be made by an officer or soldier or other person subject to military law, but if service by a civilian is deemed by the trial judge advocate or area or department, division, camp, or other superior commander to be preferable, the services of a civilian may be used, and the fees and mileage allowed by law in that locality for similar services may be paid by a finance officer from the appropriation "for expenses of courts-martial, etc."

192. Employment of Experts.—When the employment of an expert is necessary during a trial by court-martial the necessity for such employment should be made to appear by a resolution of the court. This resolution will be forwarded by the trial judge advocate, in advance of the employment, to the authority appointing the court, with a request for authority to employ the expert and for a decision as to the compensation to be paid him. The request should, if practicable, state the compensation that is recommended by the trial judge advocate and the defense counsel. The compensation of the expert, including the compensation for photographs that may be necessary in connection with his testimony, will be paid out of the appropriation "for expenses of courts-martial, etc."

Note.—Where, in advance of trial, the trial judge advocate or the defense counsel knows that the employment of an expert will be necessary, he should, without delay, apply to the appointing authority for authority to employ the expert, stating the necessity therefor and probable cost thereof.

193. Expenses of Courts-martial, etc., How Payable.—The fees of civilian witnesses, the mileage of both civil and military witnesses, the legal fee of the proper official for certified copy of a marriage certificate, the expense of pro-

curing a transcript of a stenographer's notes of testimony taken before a United States commissioner, the fees of a notary for swearing a witness, and the expenses (including railway fare and hotel bills) of a United States consul stationed in a foreign country in taking depositions, when such items are incurred in connection with a trial before a court-martial or military commission, or investigation before a court of inquiry, and other necessary expenses, are paid by the Finance Department out of the annual appropriation "for expenses of courts-martial, etc." If no finance officer be present at the place where the court it sitting, the vouchers may be transmitted direct to any finance officer. Such vouchers are not transferable.

NOTE.—Blank vouchers may be procured from any disbursing finance officer.

CHAPTER XI.

COURTS-MARTIAL—EVIDENCE.

(Revised and approved by Professor Wigmore, Colonel, Judge Advocate, Reserve Corps.)

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Section I.

INTRODUCTORY PROVISIONS.

194. General Remarks.—The oath taken by members of general and special courts requires them to try and determine "according to evidence" the matter before them. A summary court, although it does not take such an oath, will also determine the matter before it solely on the evidence in the case, and no evidence would be admissible before a summary court that is not admissible before general and special courts. The evidence thus referred to, according to which the court must decide the case, means all the matters of fact which the court permits to be introduced, or of which it takes judicial notice, with a view to prove or disprove the charges. Every item of this evidence must be introduced in open court, and it would be seriously irregular and improper for any member of the court to convey to other members, or to consider himself, any personal information that he possessed as to the merits of the case or the character of the accused without stating it in open court and, if a witness for the prosecution, retiring as a member of the court, as provided in A. W. 8 and 9. But while their knowledge of the facts must come to them from the evidence, the members are expected to utilize their common sense, their knowledge of human nature, and the ways of the world in weighing the evidence and arriving at a finding. In the light of all the circumstances of the case, they should consider the inherent probability or improbability of the evidence given by the several witnesses, and with this in mind the court may properly believe one witness and disbelieve several whose testimony is in conflict with that of the one.

The methods which are employed by courts of justice to ascertain the facts—that is, the truth—respecting any past transaction closely resemble those resorted to by an individual for a similar purpose. If A desires to ascertain whether a particular act did or did not take place, he addresses himself to those who were in a situation to observe the occurrence itself, and so endeavors to obtain from each person present his version of the occurrence. From the

testimony thus obtained he forms his conclusion as to whether or not the act took place. In the course of his investigation, however, he finds that all who were present and witnessed the occurrence as bystanders do not give testimony of equal importance or value. Some having greater powers of observation or better memories than others give in consequence more valuable testimony. Some of the witnesses, being children or persons of weak or unsound mind, are without the requisite mental capacity to observe facts or to appreciate their relations to each other; others, by reason of their moral character, are not regarded as worthy of belief by their fellow citizens; still others were insane or quite under the influence of intoxicating liquor at the time of the occurrence, and so were incapacitated from observing. A, therefore, rejects some of the statements as entirely untrustworthy; to others he attaches weight in proportion to their worthiness of belief, and so endeavors to reach a conclusion as to the truth of the occurrence or event which was the original subject of his inquiry. (Davis, p. 244.)

195. The Issues.—It is well to understand, in the beginning of this consideration of the rules of evidence, the purpose for which the evidence is to be introduced in the manner prescribed and laid down by the rules. The purpose is to elucidate and settle the issues raised in the case and to confine the evidence to such issues, under a well devised and developed system of limitations that experience has shown to best conserve the interests of all concerned.

In every criminal case the burden is on the prosecution to prove, by relevant evidence, (*a*) that the offense charged was really committed, (*b*) that the accused committed it, and (*c*) that the accused had the requisite criminal intent at the time. These three facts broadly constitute the issues in the case. Incidental issues will be formed by the necessity for proof of the essentials of an offense. Not only the allegations set out in the charges and specifications, but the component parts of such allegations as well, raise the issues to be decided. For instance, in a case of larceny, where it is charged that the accused "did take, steal, and carry away" certain articles of value, the component parts of the alle-

gation not specifically set out are that such articles were taken (*a*) fraudulently and (*b*) with the felonious intent of depriving the owner of them.

196. Analysis of Evidence by Trial Judge Advocate and Counsel.—The ends of justice and saving of time of all concerned imperatively demand careful analysis by both trial judge advocate and counsel for accused of the evidence requisite for proof of and defense against the offenses charged. As a prerequisite to such analysis the law as to the offenses charged should be studied with a view to determining the essential elements of the offense; that is, the things that must be proved by the trial judge advocate in order to justify a conviction and those that must be offered by the defense to disprove or place in reasonable doubt the proof offered by the prosecution. In other words, the prosecution and defense should limit the proffer of testimony to that which is relevant to these issues, and these only, and should prepare the case with only that in view. The essentials of the offense (see Chap. XVII) should be so clearly defined in the preparation of the case that both the trial judge advocate and counsel for accused may be ready, by appropriate objections before the court, to limit the introduction of evidence to relevant matter only, bearing in mind that only the essentials of the offense must be proved and that what may be properly considered surplusage may be disregarded.

Before trial an examination of all the sources of the evidence to be submitted should be made by the trial judge advocate and counsel for accused, and a determination as to the order in which it will be introduced should be reached. The case should be presented in sequence of events as nearly as possible, just as a story would be told by one party who had seen everything to which the different witnesses will testify. When several offenses are charged, especially if unrelated, the evidence should be directed to the development of their proof in the order charged, so that neither the court nor the accused may be in doubt at any time as to the specific offense to which the testimony being given refers. Counsel for accused should adhere to the same principle in presenting evidence for the defense.

NOTE 1.—Wherever the phrase "counsel for the accused," or any similar phrase, is used in this chapter, or elsewhere in this Manual, it is to be understood, unless the context indicates otherwise, as including both the defense counsel of the court and any individual counsel for the accused.

NOTE 2.—It is the duty of the defense counsel to begin the preparation of the case for trial on behalf of the accused, immediately upon charges being referred for trial to a court of which he is the defense counsel, without waiting for the appointment or retaining of any individual counsel; and, if individual counsel be afterwards assigned or retained, to give him the benefit of such preparation. In case individual counsel has been assigned or retained prior to the reference of the case for trial, the defense counsel will, if the accused desires, cooperate in the preparation of the case for trial, in accordance with the provisions of A. W. 17, as associate counsel for the accused.

197. Duties of Court—Opening Statements.—If the court will augment the preparation invoked in the preceding paragraph by constantly bearing in mind what the issues are and holding the trial judge advocate and counsel strictly to them, it will tend to the expedition of business, the securing of justice, and the conservation of the interests of all concerned. The court should have before it as a guide, always by reference to this Manual in each case, the following essential considerations as to any evidence that may be tendered: (1) That it is relevant to the issue; (2) that it is not within the rule rejecting hearsay evidence; (3) that, if it is a confession or admission, it is legally admissible; (4) that where documents are used the original should be obtained (except when a copy is admissible) and that the genuineness should be verified; (5) that any witnesses called are legally competent to give evidence; (6) that the examination of witnesses is fairly and properly conducted. (*Confer*, *Brit.* M. M. M., Ch. VI, par. 105.)

Further reference will always be had to the paragraphs of the Manual that set out the gist of the offenses charged (see Chap. XVII), and these will be read to the court in each case by the trial judge advocate immediately after the accused has pleaded to the charges and specifications.

It will be appropriate in all cases—and in an important or complicated case it will be required by the court—for the trial judge advocate, before proceeding with the introduction of evidence, to make a brief statement of "the nature

of the issues to be tried and what he expects to prove" (1 Thompson on Trials, 246) to sustain them. Counsel for the accused may also make an opening statement as to his defense, either just following the statement of the trial judge advocate or just after the trial judge advocate has rested his case, as counsel deems better, but the latter course is customary. It would be highly reprehensible for either trial judge advocate or counsel to get before the court in such opening statement, as a probable means of influencing its judgment, matters as to which no evidence is intended to be offered or as to which it is known that the evidence to be offered is clearly inadmissible, just as it would be so reprehensible for either to suggest for the same purpose, by questions propounded to a witness, matters known not to exist or that the rules of evidence clearly make inadmissible.

NOTE.—A violation by the trial judge advocate of the rule stated in the last sentence may require disapproval of the findings and sentence of the court, particularly in a close case.

198. Rules of Evidence for Courts-Martial.—Prior to the acts of August 29, 1916, and June 4, 1920 (A. W., 38), courts-martial followed in general the rules of evidence, including the rules as to competency of witnesses to testify, that are applied by Federal courts in criminal cases. These consisted of the rules of the common law as they existed in the several States at the adoption of the Federal Constitution in 1789, as modified from time to time by subsequent acts of Congress. But courts-martial were, however, not required by express statute to follow these rules, and had always been allowed to pursue a more liberal course in regard to the admission of testimony than do, habitually, the civil tribunals. Their purpose was to do justice; and if the effect of a technical rule was found to be to exclude material facts or otherwise obstruct a full investigation, it was deemed that the rule may and should be departed from. Proper occasions, however, for such departures were regarded as exceptional and unfrequent. (Winthrop, 473.) It was believed that "courts-martial had much better err on the side of liberality toward a prisoner than, by endeavoring to solve nice and technical refinements of the laws of evidence,

assume the risk of injuriously denying him a proper latitude for defense." (G. C. M. O. 32, 1872; see 3 Greenleaf, secs. 469, 476.) But now, by the provisions of the acts of August 29, 1916, and June 4, 1920 (A. W. 38):

"The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, in so far as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further*, That all rules made in pursuance of this article shall be laid before the Congress annually."

The modes of proof, therefore, including the rules of admissibility for testimony of witnesses and other evidence, are now by express congressional enactment placed under the authority of Executive regulation; and the rules laid down in this Manual have the force of such regulation. They therefore form the only binding rules, except such rules of evidence as are expressly prescribed (1) in the Articles of War; (2) in the Federal Constitution; and (3) in such Federal statutes as expressly mention courts-martial.

199. RULES, WHERE FOUND.—The common-law rules of evidence, with their legislative modifications, form the basis of the present regulations. These rules have been the subject of much interpretation by the courts, which will be found in the published decisions of such courts. While resort to textbooks and decisions will sometimes be necessary in the trial of an especially difficult case, it is the purpose of this chapter to state the rules of evidence applicable to trials by courts-martial in sufficient fullness to cover the field in practically all cases. Where the rule herein laid down is clear it should be taken as law (subject to the discretionary relaxation noted in par. 198), unless modified by Federal statute or some decision of the Federal courts thereunder made since the date of the publication of this Manual.

Where, in the preparation of a case, the trial judge advocate or counsel finds that the rules laid down in this chapter are not sufficiently specific clearly to settle a specially important question as to the competency of a witness to testify or

as to the admissibility of evidence intended to be introduced or likely to be offered against him, he should secure in advance of the trial and have with him in court authorities to sustain his contentions for such admission or exclusion.

But it should be kept in mind that the use of such authorities is merely to inform the court of the reason of a rule or the good sense and fairness of a proposed ruling, and not to control the decision of the court with binding effect. This caution rests on two grounds of principle: First, because the State decisions and statutes and the writers of treatises never have had any binding effect on courts-martial, the Federal statutes and decisions being the only ones that are entitled to such effect; and, secondly, because since the Federal statutes of August 29, 1916, and June 4, 1920 (A. W. 38), the modes of proof in courts-martial are governed by regulations issued by presidential order, as explained in paragraph 198, supra.

200. Rules of Evidence to be Applied Irrespective of Rank.—The rules of evidence should be applied by military courts irrespective of the rank of the person to be affected. Thus a witness for the prosecution, whatever be his rank or office, may always be asked on cross-examination whether he has not expressed animosity toward the accused, as well as whether he has not on a previous occasion made a statement contradictory to or materially different from that embraced in his testimony. Such questions are admissible by the established law of evidence and imply no disrespect to the witness, nor can the witness properly decline to answer them on the ground that it is disrespectful to him thus to attempt to discredit him. (Digest, p. 529, XI, A, 3.)

201. Protection of Witnesses.—It is the duty of the court to protect every witness from irrelevant, insulting, or improper questions; from harsh or insulting treatment; and from unnecessary inquiry into his private affairs. The court must forbid any question which appears to be intended merely to insult or annoy a witness, or which, though proper in itself, appears to be needlessly offensive in form.

202. Evidence Must Be Material and Relevant.—(1) Evidence to be admissible must be not only competent and

material, but relevant to the issues in the case. Evidence is not material when the fact which it aims to prove is not a part of the issues in the case. Evidence is not relevant when, though the fact which it aims to prove is material, yet the evidence itself is too remote or far-fetched to have any probative value for that purpose.

(2) Where evidence is apparently irrelevant it may, however (but only rarely and under exceptional circumstances), be admitted provisionally upon a statement of the trial judge advocate or counsel that other facts later to be proved will show its relevancy, but the court should afterwards exclude it if its relevancy is not ultimately shown..

NOTE.—Resort should rarely be had to the practice of allowing either side to introduce apparently irrelevant evidence, upon a promise to connect it up later. It frequently leads to controversy as to whether the promise has been made good, and often results in getting improper matter into the record, which may sometimes require a disapproval of the findings and sentence of the court. It is always safer, and will usually be found to save time and shorten the record in the end, to require the party offering the evidence to first prove the facts showing its relevancy. He may, for that purpose, be permitted to temporarily withdraw a witness or witnesses and to recall one or more witnesses who have been partially examined.

(3) Indirect evidence is known as circumstantial evidence, and signifies merely any and all evidence which is not testimonial; i. e., the assertion of a witness or other person. For example, on a charge of larceny of a wallet, the statement of a witness that he saw the accused take the wallet from the owner's overcoat is testimonial evidence; the finding of the wallet hidden in the blanket belonging to the accused is circumstantial evidence. Obviously a fact constituting circumstantial evidence must itself usually be proved in its turn by testimonial evidence; for example, the finding of the wallet as indicated above would be evidenced by a sergeant's testimony that he searched the accused's blanket and found the wallet.

(4) Testimonial evidence is thus classed by itself, because the weight to be given to testimony is subject to a group of considerations which affect all human assertions alike, as distinguished from circumstantial evidence which is of infinite

varieties having relatively few features in common with each other.

202a. Court-Martial Should Reject Improper Evidence Although Not Objected To.—A court-martial should refuse to receive improper evidence, either testimonial or documentary, even though not objected to by the accused. The reception of improper evidence may be so injurious to the substantial rights of the accused as to require disapproval of the findings and sentence of the court, even though it was not objected to by the defense.

(C. M. No. 134116, Woodland, Dec. 11, 1919; C. M. No. 116667, Partridge, July 11, 1918; C. M. No. 132922, Davis, Nov. 18, 1919; C. M. No. 128323, Woodin, Apr. 16, 1919; C. M. No. 134057, Massey, Sept. 20, 1919.)

Section II.

CIRCUMSTANTIAL EVIDENCE.

203. Circumstantial Evidence.—Circumstantial evidence is not resorted to as a secondary or inferior species; i. e., because there is an absence of direct or testimonial evidence. It is introduced even when there is direct evidence. Circumstantial evidence may furnish a safe and satisfactory ground for belief, while on the other hand direct or testimonial evidence may leave the court in doubt. The proper effect of circumstantial as compared with direct evidence has been stated as follows:

When circumstances connect themselves closely with each other, when they form a large and strong body so as to carry conviction to the minds of a jury, it may be proof of equal or even more satisfactory sort than that which is direct. In some lamentable instances it has been known that a short story has been got by heart by two or three witnesses; they have been consistent with themselves, they have been consistent with each other, swearing positively to a fact, which fact has turned out afterwards not to be true. It is almost impossible for a variety of witnesses, speaking to a variety of circumstances, so to concoct a story as to impose upon a jury by a fabrication of that sort, so that where a chain of circumstances is cogent, strong, and powerful, where

the witnesses do not contradict each other or do not contradict themselves, it may be evidence more satisfactory than even direct evidence, and there are more instances than one where that has been the case. (Wigmore, sec. 26.) In a case depending upon circumstantial evidence the court, in order to convict, must find the circumstances to be satisfactorily proved as facts, and must also find that those facts clearly and unequivocally imply the guilt of the accused and can not reasonably be reconciled with any hypothesis of his innocence. (Davis, p. 265.)

204. Illustration of Difference between Good and Bad Circumstantial Evidence.—The accused is charged with stealing clothes from the locker of a comrade. The following circumstances are not admissible as circumstantial evidence:

(1) The accused is very much disliked by other members of his company.

(2) A number of thefts from comrades have taken place in the company, and the general belief in the company is that he was connected with them.

(3) He was tried once before for larceny of clothes from a comrade and was convicted.

(4) He is suspected of being a deserter from a foreign army.

(5) He belongs to a race or enlisted in a locality that does not entertain very strict notions of right and wrong as to the manner of acquiring possession of property.

But the following series of circumstances should be admitted in evidence:

(1) The clothes were taken while the company was at drill, and there was no one known to have been in the room where the locker was.

(2) The accused was not at drill, but was detailed as kitchen police that day.

(3) He was absent from his duty as kitchen police a short while during the time when the clothes disappeared.

(4) One of the articles stolen was found in the locker of the accused.

(5) The accused was known to be without money the day before the larceny, and that evening left the post with a bundle under his arm and was seen to enter a certain house and the same night had money in his possession.

(6) Upon the house being searched next day most of the missing clothes were found there.

(7) The person found in the house identified the accused as the one from whom he had purchased the missing clothes.

205. Accused's Bad Character.—A fundamental rule is that the prosecution may not evidence the doing of the act by invoking the accused's bad moral character or former misdeeds as a ground of probability for his guilt of the offense charged. This forbids any resort to his bad character in any form, either by general repute or by personal opinions of individuals who know him. The rule is based on the well-known tendency of human nature to find an accused guilty without positive belief in his present guilt, but because of the prejudice caused by his former bad record. This rule also forbids any reference in the evidence to former specific offenses or other acts of misconduct, whether he has or has not ever been tried and convicted of their commission. All attempt to evidence guilt of the present charge by resort to the accused's moral disposition, whether shown by repute or by specific former misdeeds, must be rigorously avoided.

206. Same—Exceptions.—There are, however, four contingencies in which the prosecution may resort to the accused's bad character or specific prior misdoings, partly by way of exception to the foregoing rule and partly as falling outside its scope:

1. If the accused offers his own good character to show the probability of his innocence, the prosecution may dispute the fact of such good character by offering in rebuttal the reputation of the accused in his organization as to the bad quality in question.
2. If the accused takes the stand as a witness, his moral character for credibility as a witness (par. 257) may be evidenced in rebuttal.
3. If the accused is found guilty, then his service record may be made known to the court, as provided in

paragraphs 271, 306, and 307, subject to the provisions of Article V of the Executive order concerning maximum punishments (par. 349 infra).

4. If the intent or motive or plan or guilty knowledge of the accused is material under the issues of the case, all his prior conduct tending to show his motive or intent or other state of mind at the time of the act charged becomes relevant; and thus this conduct may include various acts which in themselves are immoral or criminal. In such case the fact that such an act is criminal or immoral does not prevent its admission, even though incidentally the act might reflect upon the moral character of the accused. The consideration of such conduct in order to reach a conclusion as to the accused's intent or motive is necessary; but the court should reject from its mind any bearing of such conduct on the accused's general trait of bad character.

This distinction is fundamental. It may be illustrated as follows:

(a) On a charge of wrongfully disposing of Government property, viz, one blanket, by selling it to a civilian (the fact of the sale being proved), the accused's conduct on recent former occasions in offering for sale a pistol and a saddle to the same or other persons may be offered to show his wrongful intent at the time of the act charged.

(b) On a charge of assaulting a fellow soldier with intent to wound, a former assault on another soldier six months before and under entirely different circumstances would not be admissible, having no bearing on the intent in the case charged.

(c) On a charge of attempt to desert, the fact that the accused had recently assaulted and beaten another soldier and was under arrest awaiting trial would be admissible to evidence a probable motive to attempt to desert.

(d) On a charge of falsification of accounts of stores, the fact that the accused had embezzled some of the same stores, if offered to evidence a motive

for concealing the embezzlement by falsifying accounts, would be admissible; but a conviction of falsification before enlistment in a totally distinct transaction would be inadmissible as bearing solely upon his general moral character and not upon his present intent or motive.

Section III.

TESTIMONIAL EVIDENCE.

207. Testimonial Evidence.—Testimonial evidence is the statement of some person offered as evidencing the fact asserted by it. For example, a statement that a rifle was discharged at a certain hour and place is testimonial evidence that it was so discharged.

Such statements may be made either in court or out of court. If made in court as a witness, then the witness must be "competent." If made out of court, then even if the person making it is competent, the statement is not admissible, because the hearsay rule forbids. (See par. 221 infra.)

The competency of the witness is therefore the important thing to determine before admitting testimonal evidence.

208. Competency Rule in General.—The modern tendency, as evidenced to a great extent by statutes of different States, and to a limited extent by Federal statutes, is to recognize practically no grounds for incompetency, but to admit the material and relevant testimony of a witness offered by either side and leave his credit to be estimated according to all the circumstances.

209. Elements of Competency of Witness.—The competency of a witness depends upon several elements, which may be divided thus: (1) His general moral and mental capacity; (2) his special expertness in subjects on which expertness is required; (3) his knowledge of the specific facts on which he testifies.

210. General Capacity of Witness.—The general capacity, mental and moral, of an adult witness is always presumed; i. e., the party must always prove to the court the specific ground of incapacity or else the witness should be allowed to testify.

210a. Children as Witnesses.—The admissibility of children as witnesses is not regulated by their age, but by their apparent sense and understanding. The court may, in its discretion, receive the testimony of any child, regardless of age, and give it such weight as it may appear to deserve; provided, only that, in the opinion of the court, the child understands the moral importance of telling the truth, for which purpose the court may examine the child.

NOTE.—This abolishes, for courts-martial, the technical common-law rules as to the competency of children. The admission of the testimony amounts to a statement of the court's opinion that the child understands the moral importance of telling the truth, and makes the testimony prima facie competent.

211. Moral Incapacity of Witness.—Moral incapacity was recognized in the common-law rule that rendered incompetent as a witness any person convicted of treason, felony, or the crimen falsi.

But this incapacity has long been abolished in almost all the States, except that several retain it with a restriction to convictions for perjury. In courts-martial, conviction of any offense does not disqualify a witness. But it may, of course, be shown to diminish his credit. (See "Credibility of Witnesses, Sec. VI, infra.)

212. Mental Incapacity of Witness.—Mental incapacity is a disqualification, but only to a limited extent, as follows: Insanity or intoxication may disqualify, but only to the extent to which they affect the subject of the testimony. For example a religious hallucination as to angels saving a man from bullets does not disqualify the person from testifying as to the time of lighting a camp fire or the persons on duty at a certain post. But such hallucinations, like general inaccuracy of memory or comprehension, liability to occasional lapses of memory, mental defect, and the like, may be inquired into, on cross-examination, as affecting the general accuracy and credibility of the witness.

213. Interest or Bias.—Interest or bias does not disqualify; i. e., the fact that a person owes a party money or has a property interest with or against a party does not disqualify him from testifying for or against that party.

A person who is a relative or an avowed enemy of the accused is not disqualified from testifying for or against the accused. The weight of such testimony when admitted is a different matter. (See "Credibility of Witnesses," Sec. VI, infra.)

Marital relationship was a disqualification at common law. Except in certain cases, husband or wife could not testify either for or against one another. This rule has been abolished in most States. In courts-martial the rule is as follows:

(1) Wife or husband of an accused may testify on behalf of the accused without restriction.

(2) Wife or husband of an accused may not be called to testify against the accused without the consent of both accused and witness, unless on a charge of an offense committed by the accused against the witness. (See par. 228.)

(3) Wife or husband of any person may not testify to confidential communications of the other, unless the other give consent.

The last two rules are rules of privilege and are more fully stated under "Privilege." (See pars. 227 et seq.)

214. Where Accused Is Witness.—It was provided by act of Congress of March 16, 1878 (20 Stat. 30), that in trials by courts-martial and courts of inquiry as well as by United States courts and Territorial courts, the accused "shall at his own request, but not otherwise, be a competent witness," and that "his failure to make such request shall not create any presumption against him."

(*a*) An accused person thus may, at his option, take the stand as a witness, and in doing so he occupies no exceptional status and becomes subject to cross-examination like any other witness. The same rules as to the admissibility of evidence, privilege of the witness, impeaching of his credit, etc., will apply to him as to any other witness, and the only noticeable difference between his examination and that of other witnesses will be that he will in general, naturally and properly, be exposed to a more searching cross examination. (Winthrop, 507.) So far as the latitude of the cross-examination is discretionary with the court, a greater lati-

tude may properly be allowed in his cross-examination than in that of other witnesses. (Id., 545.)

(*b*) When the accused testifies in denial or explanation of any offense, the scope of his direct examination (under paragraph 251) is considered to be the whole subject of his guilt or innocence of that offense. Any fact relevant to the issue of his guilt or relevant to his credit as a witness, is properly the subject of cross-examination.

(*c*) If he fails to take the stand at all, this failure must not be commented on, for such comment would violate his privilege to remain silent (par. 251). But if he testifies and if he fails in such testimony to deny or explain specific facts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon by counsel, but may be considered by the court, with all the other circumstances, in reaching their conclusion as to his guilt or innocence. (Caminetti *v.* U. S., 242 U. S., 470, 493.) Where, however, an accused is on trial for a number of offenses, and, taking the stand in his own defense, testifies to one or more of them only, he can not be cross-examined as to the others, and no comment can be made or inference drawn from his failure to testify as to the others.

215. Procedure Where Accused Fails to Testify or Make a Statement.—In each case tried by a court-martial in which the accused does not testify or make any statement in his own behalf, it shall appear on record that the president or law member of the court (see pars. 89 and 89a), or the summary court, explained to the accused that he may testify in his own behalf if he so desire, or may make an unsworn statement to the court in denial, in explanation, or in extenuation of the offense with which he stands charged. In every case tried by general court-martial, or by special court-martial where the evidence is recorded, the explanation by the president or law member and the reply of the accused thereto shall appear upon the record of trial. (See form, Appendix 9.) In other cases tried by special court-martial, and in cases tried by summary court-martial, the fact of such explanation being given in the form prescribed in Appendix 9 to this Manual will be noted in the record or report of trial.

216. Effect of Turning State's Evidence.—The fact that an accomplice turns state's evidence does not make him immune from trial, unless immunity has been promised him by the authority competent to order his trial. But, if an accomplice goes on the stand and makes a full and frank statement of the circumstances of the offense, it is customary to pardon his offense, or impose upon him a milder punishment than upon his accomplices.

217. Competency of Accused When Testifying Against an Accomplice.—**An accused who is one of two or more persons concerned in an offense is always competent to testify, whether he be charged jointly or separately, and whether he be tried jointly or separately, and whether he be called for the prosecution or for the defense. He can not, however, be called except upon his own request, since he is privileged not to incriminate himself (par. 233), and therefore, unless he first waives the privilege and elects to testify, can not be called or used as a witness by either side.** (See also par. 224, infra.)

NOTE 1.—This abolishes, for courts-martial, the ancient common-law rule that any person charged with complicity was interested in the event of the trial, and was therefore disqualified, whether he sought to testify for the prosecution or for the defense, under which resort was formerly necessary to various expedients when the prosecution desired to use the testimony of an accused; e. g., entering a nolle prosequi, directing an acquittal, or placing him on trial separately.

NOTE 2.—This does not prevent entering a nolle prosequi or a finding of "not guilty" as to any particular accused in those exceptional cases where it becomes necessary to call one of the offenders, against his will, and thus secure his testimony for the purpose of convicting others. While this course will not be encouraged, and will not be adopted without the authority of the convening authority, it may sometimes be the only means of obtaining the necessary evidence to convict the ringleaders in a conspiracy or other joint crime.

218. Expert Capacity.—On most matters the ordinary experience of any adult qualifies him to observe and testify. Hence, all persons are ordinarily qualified to testify on ordinary matters. But, when the subject is one upon which special experience is required, it will not be presumed that a witness possesses such special experience, for ordinarily he does not. Hence a witness called upon such a subject must

be shown to possess such special experience; he is therefore called an "expert" on that subject. A person may be an expert on one subject but not on another. Hence, whenever such a topic calls for testimony, the witness's special experience in it must first be shown. Whether a piece of leather has been recently tanned; whether a stain is human blood or animal blood, are instances of topics which might well require experts, if important to the issue.

In applying this rule pedantry would be out of place. Experts on all subjects are seldom within reach of a court-martial, and liberality of application is a necessity. Good sense and ordinary caution will determine whether an expert is needful for accurate discovery of the truth. For example, an expert in alcohol would hardly be needed to testify to whether the contents of a certain bottle were sufficiently alcoholic to be intoxicating, but in a homicide case, where the cause of death was disputed, obviously a medical man's testimony should be secured.

219. Insanity or Mental Defect or Derangement of Accused.—(a) The questions whether (1) the accused was of such mental condition as to be not legally responsible for the act or omission charged, if committed, or (2) is mentally so defective or deranged as to render inadvisable his punishment for crime, or as to render him (3) mentally incapable of conducting his defense intelligently, may be raised orally on the trial at any time before sentence, without any special plea or other formality, either by any member of the court, by the trial judge advocate, the defense counsel or other counsel for the accused, or by the accused himself. The court may then, in its discretion, suspend other proceedings for the examination, hearing and consideration of the matter of the mental condition of the accused, and proceed to determine, in accordance with the thirty-first article of war (see pars. 89 and 89a, supra), whether the existence of mental disease or mental derangement on the part of the accused has become an issue in the trial.

(b) Whenever it is so determined that such question has become an issue in the trial, then upon such issue the burden of proof is upon the prosecution to establish, to the satisfaction of the court, the mental condition of the accused, both at the time

of the alleged offense and at the time of the trial, and the president of a special court-martial or of a general court-martial in the absence of the law member, or the law member of a general court-martial if present, as the case may be, will so advise the trial judge advocate; and, if there is in the case a report of a medical board under paragraph 76c, supra, such report will be read in evidence on behalf of the court, and (unless the court, and also both the trial judge advocate and counsel for the accused, as well as the accused himself, think it unnecessary, and accordingly waive it) at least one of the members of such medical board will be called as a witness for the court, to be thoroughly examined, as if on cross-examination, by counsel for the accused, and also by the trial judge advocate and by any members of the court, as to any feature of the report; and on request of the accused the remaining members of the board shall, if available, likewise be called as witnesses for the court, for such cross-examination.

(c) But if there is in the case no report of a medical board under the provisions of paragraph 76c, supra, the court may, in its discretion, and will in every case where it appears to the court that there is reason to believe that the accused may be (or may have been at the time of the alleged offense) mentally defective or deranged, either temporarily or permanently, stop the proceedings and continue the case, and immediately report the facts to the convening authority with a request that a medical board be convened. In considering the question of so requesting a medical board, a court-martial may receive in evidence the report of the medical officer made to the investigating officer under the provisions of paragraph 76a, supra, in case such report, if any, be offered in evidence by the defense; but not otherwise.

(d) The convening authority, upon receiving such a request from a court-martial, will convene a medical board in accordance with the provisions of paragraph 76c, supra, which will proceed and report in the same manner as though it had been convened under the provisions of that paragraph before the reference of the case for trial, and its report will be received, referred to the staff judge advocate, and disposed of in the same manner as therein directed, and the convening authority

may thereupon dispose of the case in any of the different ways therein stated; except that, if he determines that the trial should proceed, he will refer the report of the medical board to the court with directions to proceed. If the convening authority disposes of the case in any way without returning it to the court, such action will be deemed a rescission of the order referring the case for trial and a withdrawal of the charges from the court-martial.

If the report is so referred to the court-martial by the convening authority, the court will thereupon proceed in the same manner hereinbefore directed in subparagraph (b) of this paragraph, as though the medical board had been convened under paragraph 76c, supra, in advance of reference of the case for trial.

(e) Whenever any question of mental defect or derangement of the accused is raised or suggested in any manner, as contemplated in any of the foregoing subparagraphs of this paragraph, a court-martial may, in its discretion, either while considering the statutory question (A. W. 31) whether the existence of mental disease or mental derangement on the part of the accused has become an issue in the trial, or upon a question of continuing the case and requesting the convening authority to appoint a medical board, or after receiving in evidence the report of a medical board whether convened in advance of the trial under the provisions of paragraph 76c, supra, or after the trial has begun under the provisions of subparagraphs (c) and (d) of this paragraph, call witnesses as to the mental condition of the accused, either for the court or on motion of either of the parties (including the medical officer who made the report, if any, on the accused to the investigating officer under the provisions of paragraph 76a, supra).

(f) If, at any time before a special court-martial or a general court-martial is closed to consider its findings, it appears to the president of a special court-martial or of a general court-martial in the absence of the law member, or to the law member of a general court-martial, as the case may be, that the accused is not mentally capable of conducting his defense intelligently (that is to say, is not mentally capable of communicating intelligently with his counsel, of understanding the nature of the

proceedings, and of doing the things necessary for an adequate presentation of his defense), he will so rule, subject to the right of any member to object to such ruling under the provisions of A. W. 31 (see pars. 89 and 89a, supra); and if such ruling is so made and not objected to (or is sustained by the court upon a vote in accordance with the provisions of A. W. 31, in case of objection), the trial will thereupon be discontinued and a record of the proceedings will be prepared and forwarded to the convening authority, together with the charges and all the papers in the case, with a report by the court at the end of such record to the effect that "the accused is not in proper mental condition at this time to be brought to trial"; whereupon the convening authority will dispose of the case in any of the ways contemplated in paragraph 76c, supra, except reference of the case for trial; provided, however, that if the convening authority directs that further action on the charges be suspended for the time being pending such further action as he may afterwards determine, he may at any time thereafter, whenever he is of opinion that the accused has become mentally capable of conducting his defense intelligently, again refer the case for trial, either to the same or to another court-martial.

(g) In any case in which it has been determined as provided in subparagraph (a) that the question of the existence of mental disease or mental derangement on the part of the accused has become an issue in the trial, or in which a report of a medical board has been received in evidence, as indicated in subparagraphs (b) or (d), or a report has been made to the appointing authority, as indicated in subparagraph (f), or the question of the mental condition of the accused is raised by any member of the court while in closed session to deliberate on the findings, the court in balloting upon its findings in the case will separate such question from all other questions in the case, and will consider it by itself.

Thereupon the court will proceed to ballot, in the manner prescribed in paragraph 294, infra, upon the questions:

(1) "Is the accused in proper mental condition at this time to undergo trial?" If upon such ballot the court determines such question in the negative by a majority vote (or by a tie vote, since a tie

vote is a decision in the negative), then the court will return a finding in this form: "The accused is not in proper mental condition at this time to undergo trial," and will forward the record of trial with such finding to the convening authority in the same manner and with the same effect for all purposes as hereinbefore prescribed in subparagraph (f) of this paragraph. Otherwise, the court will then proceed to ballot in order on the following further question:

(2) "Was the accused at the time of the commission of the alleged offense so far free from mental defect, mental disease, or mental derangement as to be able, concerning the particular acts charged, both (1) to distinguish right from wrong and (2) to adhere to the right?"

This question will be balloted upon as to each specification, and if answered negatively or by a tie vote the court will acquit the accused as to such specification.

If upon such ballots both of such questions are answered in the negative, the court will then proceed to consider and ballot upon the specifications and charges in the manner prescribed in paragraph 294, infra, in the same manner as though no such question of mental defect or derangement had been raised or suggested.

In determining the foregoing questions, the court will take into consideration not only the medical evidence, but all the evidence in the case.

(h) In any case of conviction of an accused by any court-martial, whether or not any question of mental defect or mental disease or derangement became an issue or was raised or suggested at the trial (or if the question was raised or suggested at the trial, but disregarded by the court), the reviewing authority, or the confirming authority if there be one, may of his own motion at any time before taking final action on the record (and in cases forwarded for consideration by the Board of Review and the Judge Advocate General under A. W. 50½, either before or after such consideration, or pending it), in his discretion, cause a medical board to be

convened to examine the accused and report in the same manner contemplated in paragraph 76c, supra, for the purpose of advising and assisting him in his decision as to the proper action to be taken upon the record. If, in view of such report when made, he shall disapprove the sentence in whole or in part, or any finding either in whole or in part, he will state in his action that such disapproval was on that ground; and in case he disapproves the sentence on such ground he may properly take any such action concerning the accused as is contemplated in paragraph 76c, supra.

NOTE.—No findings or sentence of a court-martial need ever be disapproved solely because of failure to comply with any of the provisions of this Paragraph, since the reviewing or confirming authority may always remedy such defect by availing himself of the advice of a medical board under subparagraph (h), supra.

220. Testimonial Knowledge.—A prime qualification in a witness is that he should speak only of what he has observed with his senses or had an opportunity to observe; e. g., a witness on sentry post at night might testify that he heard three shots and saw two persons running in the distance, but should stop with telling what he heard and saw. To proceed further and state that the shots killed a mule, and that the accused was one of the persons running (unless he saw the mule fall or recognized the accused at the time) may involve beliefs of his that are based on rumors and gossip picked up afterwards, beliefs for which he has no status as a witness. An important feature of correct trial methods is to summon every person who saw or heard anything relevant, but to require every such person to limit his testimony to what he himself saw or heard. In this way the court arrives (if the testimony be credited) at the basic circumstances on which the proof must be built up.

This rule also has, of course, its liberal side, based on practical experience. For example, if the issue be as to a stolen case of soap, and the quartermaster has an invoice showing 400 cases received, and he is asked how many are remaining in stock, it is not necessary that he should personally count every case; it might suffice if he ticked off 39 large bales of 10 cases, each intact, and then found a bale of 9 with 1 missing.

221. Hearsay Rule.—This fundamental principle of requiring personal knowledge (or opportunity to observe) leads up to the hearsay rule, applicable to statements made by persons not in court. The hearsay rule signifies that when a witness testifies not to what he himself saw or heard, but to what he heard some one else say, his testimony on that point shall be rejected, and the person who said it shall be produced in the court to testify, the object being to get at the first-hand source of knowledge. Experience shows again and again that when that other person is produced either what he actually said was something very different, or else when cross-examined he turns out to have only a scanty trustworthiness. For example, if the sentry in the above instance testifies that he did not identify the person running, but afterwards in barracks Sergt. S said that it was X, the court would exclude what Sergt. S said, would summon S to testify in person, and then it might appear that all Sergt. S knows about it is that X came into barracks half an hour later looking as if he were out of breath, and this might be connected up with an errand on which X had been sent, by testimony of his captain. The hearsay rule, therefore, is a corollary of the principle that a witness must testify from what he has himself seen and heard, and not from what another person has told him or written to him.

The following are familiar instances of hearsay in court-martial cases:

(1) A soldier is being tried for desertion. Pvt. A is able to testify that Pvt. B told Pvt. A that the accused told Pvt. B that he (the accused) intended to desert at the first opportunity. Such testimony from Pvt. A would be hearsay and would be inadmissible. Pvt. B himself should be called.

(2) A soldier is being tried for larceny of clothes from a locker. Pvt. A is able to testify that Pvt. B told Pvt. A that he (Pvt. B), about the time the clothes were stolen, saw the accused leave the quarters with a bundle resembling clothes. Such testimony from Pvt. A would be hearsay and would be inadmissible. Pvt. B himself should be called.

(3) A soldier is being tried for selling clothing. Policeman A is able to testify that, while on duty as policeman, he saw the accused with a bundle under his arm go into a shop,

that he (the policeman) entered the shop and the accused ran away and the policeman was unable to catch him. The policeman the next day asked the proprietor of the shop what the accused was doing there, and the proprietor replied that the accused sold him some clothes issued by the Government and that he paid the accused $2.50 for them. The testimony of the policeman as to the reply of the proprietor would be hearsay and would be inadmissible. The fact that the policeman was acting in the line of his duty at the time the proprietor made the statement would not render the evidence admissible.

In the foregoing instances the fact that the accused said he intended to desert, that the accused left the quarters with a bundle, and that the accused sold the proprietor the clothes, constitute most important evidence and can be proved in the first two instances by Pvt. B and in the third instance by the proprietor, but they can not be proved by hearsay evidence.

If evidence is hearsay it does not become admissible because it was made to an officer in the course of an official investigation. For instance, in illustration (1), if Pvt. B had made his statement to Capt. C in the course of an official investigation by Capt. C, the statement would still be hearsay and inadmissible.

Official statements and opinions as to either guilt or innocence expressed by an officer, as, for instance, a company, regimental, or department commander, or by a staff officer, in an indorsement, are not admissible in evidence by reason of the official character of the indorsement or the rank or position of the officer making it, as it would be hearsay. Nor is such a statement or opinion evidence because it is among papers referred to the trial judge advocate with the charges. It would be irregular to permit such statements or opinions to come to the attention of the court. If they do become known to the court they should, of course, not be considered in arriving at a finding or sentence.

221a. Exceptions to the Hearsay Rule.—**The hearsay rule is subject to some well-established exceptions; most of them are based on the general principle that there is an unavoidable necessity for using the hearsay, because the person is deceased**

or for some other reason can not be secured as a witness. These exceptions are now settled, however, into fixed rules, irrespective of the above principle.

The principal exceptions likely to be presented for application in court-martial trials are the following (cross references are given to those which are later more fully stated in this Manual).

(1) Dying Declarations (par. 222).

(2) Statements of Facts Against Interest.—A statement of a fact against the pecuniary or proprietary interest of the declarant is admissible; e. g., where he states he has received payment for a debt, or that he is not the owner but only bailee of a chattel. But this exception applies only where the declarant is deceased, or out of the jurisdiction, or otherwise unavailable as a witness on the stand.

(3) Statements about Family History.—A statement by a family member, or the general family repute, about a fact of family history, such as birth, parentage, relationship, marriage, age, etc., or the date or place thereof, is admissible. But if the statement is by an individual family member (and not general family repute), the declarant must be shown to be deceased, out of the jurisdiction, or otherwise unavailable as a witness on the stand.

(4) Regular entries in a book of business transactions (par. 244).

(5) Official Statements in Writing.—An official statement in writing (whether in a regular series of records, or a report, or a certificate) is admissible when the officer had the duty or authority to do or to know the matter so stated (par. 238a).

(6) Scientific Treatises.—A treatise or essay on a subject of science or art, composed by a person expert therein, is admissible. But there should be usually preliminary testimony by a qualified witness that the author is approved in his profession as an expert or that the treatise is a standard one.

(7) Commercial Lists, Registers, etc.—A list or register or report containing data of general interest to some commercial, industrial, or professional occupation, and published for use therein, is admissible.

(8) Statements of Mental or Physical Condition.—A person's statements of his present mental condition or physical sensation are admissible, without calling him to the stand or accounting for his absence; but the statement must relate to his present condition, and not to past external events; e. g., a person's statement that he has pains in his back, or that he intends to take a certain train next day, or that he is angry with a certain person, or that he refuses to go because he is afraid of something, is admissible. When interviewed by a physician, his statement as to the cause of his suffering is admissible. Statements of an accused, when doing an act, as to his intent or motive are admissible under this rule, even when they are offered in his own favor; when offered against him, they are also receivable as a party's admissions under par. 226.

(9) Statements, Exclamations, or Res Gestæ (par. 223).

(10) Statements of Deceased Persons in General.—In courts-martial the liberal principle, now adopted in one or two States, may well be followed in extreme cases, viz, wherever the person, whose statement is desired to be offered (whether written or oral), is deceased at the time of the trial, and was a person having personal knowledge of the facts, his statement may be admitted, in the discretion of the court.

222. Dying Declarations.—On trials for murder and manslaughter, the law recognizes an exception to the rule rejecting hearsay by allowing the dying declarations of the victim of the crime, in regard to the circumstances which produced his condition, and especially as to the person by whom the violence was committed, to be detailed in evidence by one who heard them. The reason for admitting such declarations where the victim believes death is impending is that his belief is equal to the sanctity of an oath in causing him to tell the truth. It is no objection to their admissibility that they were brought out in answer to leading questions or upon urgent solicitations addressed to him by any person or persons; and if, instead of speaking, he answered the questions by intelligible signs these signs may equally be testified to. Dying declarations are admissible as well in favor of the accused as against him. It is to be remarked

that evidence of dying declarations made as such usually are under circumstances of mental and physical collapse or extreme weakness and without being subjected to the ordinary legal tests are generally to be received with great caution. (Winthrop, p. 493.)

223. Res Gestæ.—Another exception to the hearsay rule consists of the inculpatory or exculpatory declarations or statements that constitute part of the res gestæ. By the res gestæ is meant the circumstances and occurrences substantially contemporaneous with the facts at issue that explain and elucidate the character and quality of such facts. Such are threats or declarations of the accused in connection with his commission of the crime that indicate his intent or knowledge; declarations or exclamations of a party injured that go to indicate the nature of the violence and the parties responsible; language of accomplices; cries of bystanders; facts, circumstances, and declarations showing premeditation and preparation for the crime. All such may be established by the testimony of persons who heard the utterances, etc. All such declarations and statements must be made so near in time to the principal transaction as to preclude the idea of deliberate design or afterthought in making them, but it is not essential that they should have been made in the presence or hearing of the accused. Where the crime committed is the culmination of a series of acts, such as in riots, etc., the res gestæ rule applies to all acts and declarations of the rioters and of bystanders that would tend to indicate purpose, motive, etc.

The res gestæ is considered as an act connected with or an incident of a main transaction, and not as testimony; and as soon as it assumes the character of a narration rather than a spontaneous exclamation, there is probable ground for belief that it was inspired by a desire to influence the case, and it is then inadmissible, as falling under the hearsay rule. The application of the rule of res gestæ is not limited strictly to circumstances and occurrences contemporaneous with the principal facts at issue nor with the transactions leading up to the principal facts. The following examples illustrate what constitute the res gestæ:

Where a soldier is charged with murder, manslaughter, or assault, and the party against whom the violence is offered is another soldier, and the wife of the former, while walking with the latter, exclaims, "Run! here comes my jealous husband, and he will kill you!", her exclamations would be admitted as part of the res gestæ. If the soldier had then fled to his house pursued by her husband and she had followed to deter him from injuring the other party and later had run from the house shouting, "My husband is killing Jones!", or "has just killed Jones!", her exclamations would be admissible as constituting part of the res gestæ. If a party in the next room had heard a shot and then a voice that he recognized as Pvt. Jones's say, "You shot me for revenge and nothing else," the declaration would be considered as a part of the res gestæ.

223a. Identification of the Accused.—This identification of the accused involves two distinct elements, viz: First, that the person now in court as accused is the same person described in the charges by name, rank, title, and organization; secondly, that the person now in court as accused (irrespective of his name, rank, etc.) is the very person who did the act charged and to which act the witness's testimony will refer. The first of these elements is usually proved by witnesses who know the accused and the facts as to his rank and organization, and when necessary, by official records or duly authenticated copies. The second element involves the question whether the person now in court (his name, rank, and organization being assumed to be otherwise duly evidenced) was the actual person who, e. g., took part in the affray or the rape, or made the false pretenses, or did whatever is the offense charged. Whenever this fact is disputed, care must be taken to offer all available evidence that may serve to remove doubt as to identity; for no injustice is more pronounced than that of convicting an innocent person by reason of mistaken identity.

224. Evidence of Conspirators and Accomplices.—In cases where several persons join with a common design in committing an offense all acts and statements of each of them made in furtherance of the offense are admissible against each of the others. Only where the statements of such con-

spirator fall within the rule laid down for admission of evidence as a part of the res gestæ could such statements be admissible for the defense. The acts and statements of a conspirator, however, made after the common design is accomplished or abandoned, are not admissible against the others, except acts and statements in furtherance of an escape. It is immaterial whether such acts or statements were made in the presence or hearing of the other parties. They are binding upon all parties if they are in furtherance of the common design. Foundation must first be laid by either direct or circumstantial evidence sufficient to establish prima facie the fact of conspiracy between the parties. But as it sometimes may interfere with the proper development of the case to require the trial to begin with proof of the conspiracy, in such case the prosecution may, at the trial, prove the declarations and acts of one made and done in the absence of the others, before proving the conspiracy between the defendants, though such proof will be treated as nugatory unless the conspiracy be afterwards independently established. (See, however, note to subparagraph (2) of paragraph 202, supra.) While in Federal courts and courts-martial corroboration of the testimony of a coconspirator, or accomplice, need not be required, yet from the character of the associations formed the uncorroborated testimony of a coconspirator, or accomplice, should be received with great caution.

225. Confessions.—Another exception to the rule excluding hearsay evidence is the rule that admits testimony as to confessions of guilt made by the accused. The most common form of confession is that contained in the plea of guilty made by the accused in open court in answer to a charge. This is not the kind of confession referred to as constituting an exception to the hearsay rule. The confessions referred to are those made out of court. The following rules limit the use of such confessions:

(a) A confession must be offered in its entirety, so that the accused receives the benefit of having all of his statements construed together to reach their full and actual meaning. A confession can not be used as evidence by taking only one or more parts specially unfavorable to the accused. But this rule only

applies to all the statements made at a single interview or in a single document; statements made by the accused at a separate time or in another document need not be used.

(*b*) It must be shown, before admitting it, that the confession was entirely voluntary on the part of the accused. If the confession is voluntary on its face, the burden is on the defendant to show that it was incompetent. (Wharton Crim. Ev., 1419; Underhill Crim. Ev. 127.)

A confession is, in a legal sense, " voluntary " when it is not induced or materially influenced by hope of release or other benefit or fear of punishment or injury induced or influenced by words or acts, such as promises, assurances, threats, harsh treatment, or the like, on the part of an official or other person competent to effectuate what is promised, threatened, etc., or at least believed to be thus competent by the party confessing. And the reason of the rule is that where the confession is not thus voluntary there is always ground to doubt whether it be true. (Winthrop, p. 496.) In military cases, in view of the authority and influence of superior rank, confessions made by inferiors, especially when ignorant or inexperienced and held in confinement or close arrest, should be regarded as incompetent unless very clearly shown not to have been unduly influenced. Statements, by way of confession, made by an inferior under charges to a commanding officer, judge advocate, trial judge advocate, or other superior whom the accused could reasonably believe capable of making good his words, upon even a slight assurance of relief or benefit by such superior should not in general be admitted. Thus in a case where a confession was made to his captain by a soldier upon being told by the former that " matters would be easier for him," or " as easy as possible," if he confessed, such confession was held not to have been voluntary and therefore improperly admitted. And it has been similarly ruled in cases of confessions made by soldiers upon assurances being held out or intimidation resorted to by noncommissioned officers. (Winthrop, p. 498.) Confessions made by private soldiers to officers or noncommissioned officers, though not shown to have been made under the influence of promises or threats, etc., should, in view of the military relations of the parties,

be received with caution. Of course, the above principles apply to a written confession as well as to a verbal one. In some cases before courts-martial it appears that the accused has signed a paper confessing his guilt, stating in the paper that he confesses freely without hope of reward or fear of punishment, etc. Such statements are not conclusive that the confession was voluntary. Evidence may be introduced. If the evidence shows the statement was not in fact voluntary, it should not be considered by the court.

Where the confession was made to a civilian in authority, such as a police officer making an arrest, the fact that the official did not warn the person that he need not say anything to incriminate himself does not necessarily in itself prevent the confession from being voluntary. But where the confession is made to a military superior the case is different. Considering the relation that exists between officers and enlisted men and between an investigating officer and a person whose conduct is being investigated, it devolves upon an investigating officer, or other military superior, to warn the person investigated that he need not answer any question that might tend to incriminate him. Hence, confessions made by soldiers to officers or by persons under investigation to investigating officers should not be received unless it is shown that the accused was warned that his confession might be used against him, or unless it is shown clearly in some other manner that the confession was entirely voluntary.

(*c*) At some time during the trial, corroborating evidence must be introduced either direct or circumstantial, outside of the confession itself, that the crime charged has been committed. This is what is technically known as the rule requiring proof of the corpus delicti; that is, some proof of the fact that the crime charged has probably been committed by some one, so that there will be some corroboration of the confession. Usually the corpus delicti is evidenced before any other main fact. But for the convenience of the court or witnesses a confession may be received, subject to being stricken out upon failure to prove the corpus delicti, and if the corpus delicti is afterwards proven, the rights of the accused will not be prejudiced. (But see note to subparagraph (2) of par. 202.) It

is not requisite that this outside evidence constituting proof of the corpus delicti shall be sufficient to convince the court beyond a reasonable doubt of the guilt of the accused, nor need it cover every element contained in the charge. For instance, where desertion is charged proof of absence without leave would be considered as proving the corpus delicti; where the charge is that a sentinel had left his post before being regularly relieved it would be sufficient to prove that he was not on his post during his period of duty; where a homicide is charged the proof of the death of the person charged to have been killed amounts to proof of the corpus delicti; and in cases of larceny and selling clothing the fact that the property alleged to have been stolen or sold was missing is sufficient proof.

(*d*) In view of the peculiar conditions of mind and body under which accused persons are often placed when making confessions, of the liability to mistake on the part of the witnesses who repeat them when oral, and of the tendency of these latter to exaggerate through a zeal for conviction, evidence of confessions, unless corroborated by other reliable evidence, is in general to be received with caution. Where, however, a confession is explicit and deliberate as well as voluntary, and, if oral, is proved by a witness or witnesses by whom it has not been misunderstood and is not misrepresented, it is indeed one of the strongest forms of proof known to the law (Winthrop, p. 499).

Courts should bear in mind that mere silence on the part of an accused when questioned as to his supposed offense is not to be treated as a confession.

(*e*) Although the confession, because not voluntary, is inadmissible, yet any information given in the confession that leads to the discovery of relevant facts will not render testimony of such facts inadmissible, and it may be further shown, by way of corroboration of such facts, that the discovery was either wholly or partially due to the information thus obtained.

NOTE 1.—It has been held that where alleged confessions were offered in evidence and the court directed the trial judge advocate to hand the statements to the accused and the accused was asked "if that was his statement," this was an invasion of the substantial rights

of the accused, in that it compelled him to give evidence against himself (even though not objected to by the defense), C. M. No. 135096, Anderson, August 2, 1919.

226. Admissions Against Interest.—Somewhat connected with the subject of confessions is that of declarations or admissions against one's own interest. This constitutes another exception to the rule excluding hearsay. The law makes a distinction between mere admissions and complete confessions of guilt, and there is no requirement that before an admission can be received in evidence there must be an affirmative showing that it was voluntary. In many instances the accused, after the commission of an offense, makes statements which fall short of a full confession of guilt but do constitute important admissions as to his connection with the offense. The rule is that such admissions if against his own interest may be admitted in evidence. For instance, in a case of homicide in a dance hall, if the accused when arrested made the statement that he was in the hall when the homicide took place, such a statement is admissible as against his interest. On a trial for desertion, a statement of the accused to the sheriff that he was "tired of working for the Government," and that he did not want to work for them any longer, was an admission and not a confession. An admission does not necessarily involve a criminal intent, while a confession is an acknowledment of guilt. Instances of such admissions would be (a) concealment by an alleged deserter when he knew he was being searched for; (b) destruction of, or an effort to destroy, documentary evidence which an accused knew was to be used against him; (c) bribery or attempted bribery of a prospective witness by the accused to testify that the accused was at a certain place at a certain time (when he was not). (See also Wigmore, Pocket Code, Ev., 641–665.)

227. Privileged Communications.—A privileged communication is one that relates to matters occurring during a confidential relation, which it is the public policy to protect. A witness can, and usually should, decline to answer a question touching such a communication, and where the privilege is that of the accused, or of the Government, or of any person other than the witness, the court will not permit the witness to

answer such question, except with the consent of the person entitled to the benefit of the privilege or of the proper governmental authorities, as the case may be. The confidential relations that were protected at common law and which are met with in court-martial practice are the following:

State Secrets.—Communications made by informants to public officers engaged in the discovery of crime are privileged. The deliberations of courts and of grand and petit juries are privileged, but the results of their deliberations are not privileged. Diplomatic correspondence, and, in general, all oral or written official communications which, in the opinion of the President, would be detrimental to the public interests, and official communications between the heads of the departments of the Government and their subordinate officers are privileged. Were it otherwise it would be impossible for such superiors to administer effectually the public affairs with which they are intrusted.

Husband and Wife.—Communications between husband and wife are privileged. (But see par. 228, infra.)

Attorney and Client.—The testimony of the attorney or his interpreter or stenographer, as to communications between the client and the attorney, made while the relation of attorney and client existed and in connection with the matter for which the attorney was engaged, will not be received by a court, unless such communications clearly contemplate the commission of a crime; i. e., perjury, subornation of perjury, etc. Of course, communications prior to or subsequent to the relation are not privileged. The client, but not the attorney, may waive this privilege.

Police secrets.—The privilege that extends to communications made by informants to public officers engaged in the discovery of crime should be given a common-sense interpretation. The public interests would ordinarily be prejudiced by reason of the disclosure of such communications in a case as involved the identity of parties employed for the detection of criminals or would endanger the party who made such communication, or would injuriously affect the chances of securing such agents for the detection of crime in the future. But the material interests of the accused to vindicate his in-

nocence should not be allowed to suffer by reason of the exclusion of such evidence.

The purpose of the privilege, extended to communications between husband and wife and attorney and client, which grows out of a recognition of the public advantage that accrues from encouraging free communication in such circumstances, is not disregarded by allowing outside parties who overhear such privileged communications to testify to what they have overheard. It would not be permitted, however, for one of the minor children of the parents, who might reasonably be presumed by the parents not to understand what they were talking about, to testify to communications overheard by such child.

228. PRIVILEGE OF WIFE AND HUSBAND TO TESTIFY.—At common law the rule was that neither husband nor wife is competent as a witness against the other, except in a case of bodily injury inflicted by one of them upon the other.

A married woman is excluded as a witness from motives of public policy. (Lucas *v.* Brooks, 18 Wall., 436, 453.)

Certain departures have been made from the common-law rule by Federal statutes and decisions.

In any prosecution for bigamy, polygamy, or unlawful cohabitation under any statute of the United States, the lawful husband or wife of the accused shall be a competent witness, and may be called, but shall not be compelled to testify in such proceedings, and shall not be compelled to testify * * * without the consent of the husband or wife, as the case may be. (Act of Mar. 3, 1887, 24 Stat., 635.)

The wife should be permitted to testify against her husband, even without his consent, whenever she is the particular individual directly injured by the crime committed by her husband. It would, therefore, be appropriate in such cases against a husband as bodily injury of any character inflicted by him upon her, bigamy, polygamy, or unlawful cohabitation, abandonment of wife and children, or failure to support them, or designating another woman beneficiary under the War Risk Insurance Act (C. M. 112488, McCollister, May 22, 1918), or using or transporting her for "white-slave" pur-

poses (C. M. 114676, Wilson, May 22, 1918), or immoral purposes, for the wife to be permitted to testify against her husband; but she can not be compelled to do so, and her statement of her reason for declining to testify can not be treated as proof of the marriage. (C. M. 121028, Dorton, Nov. 14, 1919.)

229. Telegrams Not Privileged.—Neither private telegrams nor the information regarding them that comes to the knowledge of telegraph operators, either military or civil, are privileged. Telegraph operators, both military and civil, may be subpœnaed to testify before a court-martial as to private telegrams, and private telegrams may be brought before a court-martial by the usual process.

230. Confidential Papers.—The reports of special inspections by the Inspector General's Department are confidential documents and the testimony taken is considered a part and parcel of such reports. There is no law or regulation which requires copies of the evidence contained in these confidential reports to be furnished to officers whose conduct has been under investigation. So also the reports of the Judge Advocate General to the Secretary of War have always been regarded as confidential communications and it has not been the practice to furnish copies of them to parties outside the department in the absence of special authority from the Secretary of War. If the prosecution has had access to any such document, fairness requires that the accused should have equal access to it.

231. Communications from Officers or Soldiers to Medical Officers Not Privileged.—It is the duty of medical officers of the Army to attend officers and soldiers when sick, to make the annual physical examination of officers, and examine recruits for enlistment, and they may be specially directed to observe an officer or soldier or specially to examine or attend them; such observations, examination, or attendance would be official and the information acquired would be official. While the ethics of the medical profession forbid them to divulge to unauthorized persons the information thus obtained and the statements thus made to them, such information and statements do not possess the character of privileged communications. If the medical officer, when

called as a witness before a court-martial, refuses to testify to such matters, he is subject to charges under A. W. 96.

232. COMMUNICATIONS BETWEEN CIVILIAN PHYSICIANS AND PATIENTS NOT PRIVILEGED.—Neither are the communications between civilian physician and patient privileged, and the refusal of a physician to testify to such communications would subject him to the prosecution provided by A. W. 23.

233. COMPULSORY SELF-CRIMINATION PROHIBITED.—The fifth amendment to the Constitution of the United States provides that in a criminal case the person shall not be compelled "to be a witness against himself." The principle embodied in this provision applies to trials by courts-martial and is not limited to the person on trial, but extends to any person who may be called as a witness. A. W. 24 provides that no witness before a military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to degrade him.

Thus, it is error requiring a disapproval of the findings and sentence of the court for the trial judge advocate to call the accused as a witness against himself and thus elicit important admissions from him (C. M. 108428, Hamilton, Jan. 5, 1918; C. M. 129804, Jones, May 20, 1919; C. M. 128735, Soldier, Apr. 23, 1919).

It must be noted that this rule draws a distinction between questions that tend to criminate and those that tend to degrade, the constitutional protection extending in the first instance against questions whether material or not, while in the second instance the statutory protection extends only to questions which are not material to the issue.

(*a*) *Where privilege as to self-crimination ceases.*—As in the following cases the witness would not be liable to the law's punishment, his privilege as to self-incrimination ceases:

Conviction and the suffering of the punishment; acquittal; former jeopardy (except a former trial, upon a rehearing or new

trial, or where a rehearing or new trial has been or may be ordered); abolition of the general crime, subsequent to its commission (provided the rule of criminal law thereby exonerates prior offenders); lapse of time barring prosecution of the particular offense; executive pardon for the particular offense; statutory amnesty, before or after the act, for the particular criminal act or for the offender. (Wigmore, p. 3163.)

234. Privilege Against Self-Crimination is a Personal One.—The privilege of a witness to refuse to respond to a question, the answer to which may incriminate him, is a personal one, which the witness may exercise or waive as he may see fit. It is not for the trial judge advocate or accused to object to the question or to check the witness, or for the court to exclude the question or direct the witness not to answer. Where it appears that the witness is ignorant of his rights and that the answer to a question might incriminate him, the president of the court will inform him of his right to decline to make any answer which might tend to incriminate him.

235. Procedure Where Alleged Incriminating Question Is Asked.—Where the court overrules an objection made by a witness that the answer to a question will incriminate him the witness should answer the question. If he is a person subject to military law and refuses to answer, charges may be preferred against him under A. W. 96. If he is a civilian witness the facts should be certified to the United States district attorney by the court with a view to his prosecution as provided in A. W. 23. (See A. W. 23 as to other tribunals and agencies.) In any case of refusal to answer a question after the court has held it to be a proper one, the refusal may be commented on by the trial judge advocate or counsel in his remarks to the court.

236. Not Self-Crimination to Require Accused to Submit to Physical Examination.—"The prohibition of the fifth amendment against compelling a man to give evidence against himself is a prohibition of the use of physical or moral compulsion to extort communications from him and not an exclusion of his body as evidence when it is material." (Holt *v.* U. S., 218 U. S., 245.)

The following are illustrations of what might be required without violating the privilege contained in A. W. 24, or the principle embodied in the fifth amendment:

(*a*) The admission of testimony as to marks and scars found upon the person of a defendant, in a criminal prosecution, during a forcible examination of him with a view to ascertaining his identity for the purpose of arresting him, is not prohibited. (O'Brien *v.* Indiana, L. R. A., Book 9, 1890, p. 323; see also 12 Cyc., 401.)

(*b*) Upon the trial, a question was raised as to the identity of the defendant. One witness testified that he knew the defendant, and knew that he had tattoo marks (a female head and bust) on his right forearm. The court thereupon compelled the defendant, against his objection, to exhibit his arm, in such a manner as to show the marks to the jury. (State *v.* Ah Chuey, alias Sam Good, 14 Nev., 79.)

(*c*) An officer of the Army was ordered to a place for identification by civilian witnesses in relation to charges which were pending against the officer, and it was held that such an order would not be in violation of the officer's privilege, as it called for no testimonial communication from him.

It follows that it would be appropriate for the court to order the accused to remove his clothing for the purpose of examination by the court or by a surgeon who would later testify as to the results of his examination; and, upon refusal to obey the order, the accused might have his clothing removed by force. The accused might likewise be compelled to try on clothing or shoes or place his bare foot in tracks, etc. But, where resort to extreme force would be necessary to compel compliance in the presence of the court, it would comport more with the dignity of the court to have a surgeon make the examination out of the presence of the court and testify as to the result of the examination, or to advise the accused as to the purpose of the examination, and to warn him that his refusal to obey would be considered as an admission on his part of what was sought to be ascertained by the examination. This conclusion would be quite within legal bounds as to presumption of facts.

Section IV.

DOCUMENTS.

236a. General Rules Applicable to Documents.—In the use of documents (written or printed) in evidence, there are four fundamental rules to be satisfied, each of them resting on experience demonstrating them to be necessary or useful, where any real dispute exists.

(1) Rule 1.—Production of the Original.—When the contents of a document are to be proved, the original should be produced, if it can be obtained; if not, and then only, resort may be had to a copy, or to oral testimony based on recollection.

(2) Rule 2.—Giving Testimonial Status to a Writing.—When a document is not one having a per se legal effect (such as a note, check, deed, or will) it is virtually written testimony. Hence, it must be made a part of the testimony of some witness, who on the stand adopts it and verifies it. Two common applications of this are the use of memoranda (par. 241) and maps, etc. (par. 245).

(3) Rule 3.—Hearsay Rule; Exception for Official Statements.—When a document is of the foregoing sort, i. e., a testimonial writing requiring adoption by some witness, and if the author of it does not appear as a witness, it remains only as a hearsay statement, i. e., by some one not sworn or cross-examined; hence it can be received only under some exception to the hearsay rule (par. 221). Entries in books of accounts of deceased persons (par. 244) are an example of this. Official records and certificates (pars. 238 and 238a) are another common example; here the principle is that an official statement is admissible only if the officer making it had the duty or authority to do or to know the matter stated by him.

A principal application of this rule occurs where a purporting copy is offered to prove the contents of an original not available for production under Rule (1) above. Here the copy, being somebody's testimony to the contents of the original, must be verified by calling a witness to the stand; or else the statement of the absent person signing it as a true copy must be received under the exception to the hearsay rule for official statements (pars. 238 and 238a).

(4.) Rule 4.—Authentication.—Any and every document must be authenticated; i. e., it must be shown to have been actually made by the person who purports to have made it; in short, its genuineness must be shown. This may be proved like any other fact—by calling a witness who saw it executed, or, specially, by calling a witness to the style of handwriting (par. 240). It may also be done by using the (hearsay) statement of an absent person, under the exception for official statements (pars. 238 and 238a), as where a notary's certificate of the party's acknowledgment is used, or where an official copy by the custodian is used.

In all such cases of the use of official documents, proof of genuineness is facilitated by the presumption of genuineness which attaches to an official seal or signature, with recital of the official title of the person signing. No further evidence of genuineness is needed, where this presumption applies.

The foregoing four principles are not all called into play for every document, but sometimes one, sometimes two or more, are concerned in using the same document. But all of the ensuing specific rules are based on, and reducible to, one or another of the foregoing four principles. Hence, the question will be, in every case of objection to a document, which one or more of these principles is at the root of the objection, and thus it may be determined how to overcome the objection and satisfy the requirement of the principle involved.

236b. Writings Not in Dispute.—Where a document is offered in evidence, the application of the foregoing principles, viz, that the original be produced if available; that a testimonial writing be verified on the stand, or, if not, that the document or entry be made by an officer having a duty to make it; that an official copy be shown to have been made by an officer having custody of the original; and that the signature be authenticated; should not be rigorously enforced where it appears to the court there is no real issue or dispute as to the correctness or authenticity of the document or entry. Unless such strict proof is called for, on the request of the accused, or by reason of necessity of showing in the record the facts giving jurisdiction or involving the substance of the offense, the observance of the general rules in every detail will not ordinarily be deemed a requisite.

(RULE 1:)

237. MANNER OF PROVING CONTENTS OF WRITING.—A writing is the best evidence of its own contents and must be introduced to prove its contents. But if it has been lost or destroyed or it is otherwise satisfactorily shown that the writing can not be produced, then the contents may be proved by a copy or by oral testimony of witnesses who have seen the writing. Under this rule if it is desired to prove the contents of a private letter or other unofficial paper, or an official paper such as a pay voucher, written claim against the Government, pay roll or muster roll, company morning report, enlistment paper, etc., the strict and formal method of doing so is to prove by proper evidence that the writing is in fact what it purports to be, and then introduce in evidence the original or a properly authenticated copy.

When the original consists of numerous writings which can not conveniently be examined by the court, and the fact to be proved is the general result of the whole collection, and that result is capable of being ascertained by calculation, the calculation may be made by some competent person and the result of the calculation testified to by him, as, for instance, if the fact to be proved is the balance shown by account books. In such case the opposite party should have access to the books and papers from which the calculation is made.

It is customary for the party introducing a writing in evidence to read it to the court. But unless the court directs it to be read at once it may be read at any time.

NOTE.—Care must be exercised in making use of the foregoing relaxation of the general rule relating to testimony resulting from examination of numerous writings. Thus, for example, where on a prosecution for embezzlement of company funds the only evidence for the prosecution of the amount which should have been in the fund, was that of an officer who testified that he had examined the books and found the shortage complained of, it was held that this evidence was incompetent, and so much of the finding of guilty as was based on that evidence was disapproved, because the books themselves, constituting the best evidence, were not introduced in evidence; since, while the rule is that where the originals consist of numerous docu-

ments which can not be conveniently examined in court, and the fact to be proved is the general result of an examination of the whole collection, evidence may be given of the result by any person who has examined the documents and who is skilled in such matters, provided the result is capable of being ascertained by calculation, yet it was not shown in that case (a) that the books could not have been conveniently examined by the court, nor (b) that the officer testifying was "skilled in such matters." (C. M. 130729, Tengler, June 4, 1919.) In such cases it must be shown to the court that:

(a) The writings are so numerous or bulky that they can not conveniently be examined by the court.

(b) The fact to be proved is the general result of the whole collection.

(c) The result is capable of being ascertained by calculation.

(d) The witness is a person skilled in such matters, and capable of making the calculation.

(e) He has examined the whole collection and has made such a calculation.

(f) The opposite party has had access to the books and papers from which the calculation is made.

(g) Opportunity is afforded the opposite party to cross-examine the witness upon the books and papers in question, and to have them, or such of them as the cross-examiner may desire (or properly authenticated or proved copies), produced in court for the purposes of the cross examination.

237a. Report of Investigating Officer—Summary of Evidence of Preliminary Investigation.—Neither the report of an investigating officer nor the summary of the testimony of a witness on a preliminary investigation of a charge is competent evidence, whether or not the investigating officer or the witness in question be called as a witness at the trial. The witness should be required to testify personally to the facts, regardless of any former statement.

NOTE 1.—On cross-examination he may be asked if he did not say such or such a thing or things in his former statement or report, for the purpose of testing his memory, accuracy, or veracity, or of laying a foundation to impeach him; and, if the cross-examiner reads any part of the report or former statement into evidence in connection with the cross-examination, the opposite party may offer in evidence so much of the document as bears upon the same immediate subject, for the purpose of getting the whole former statement of the witness on that immediate subject fairly before the court.

NOTE 2.—The investigating officer can not testify to any statements made to him in the course of the investigation, since his repetition of such statements would be hearsay. The witness making the state-

ments must be called to testify to the facts. (See pars. 221 and 221a, supra, "Hearsay.")

(RULE 1:)

238. PUBLIC RECORDS.—An important exception to the rule that the contents of a writing must be proved by the writing itself is in the case of public records required to be preserved on file in a public office, in which case duly authenticated copies may be admitted in evidence equally with originals without first proving that the originals have been lost, destroyed, or their absence accounted for in some other way. This exception is made necessary by the inconvenience to the public business that would result if such records were removed.

War Department and Army Records.—Copies of any records or papers in the War Department, in any of its bureaus, or in any office of any of the supply departments; or at the headquarters of an Army, field army, corps, division, brigade, or regiment; or of an army area, corps area, territorial division, territorial department, or post, if authenticated by the impressed stamp of the bureau, office, or headquarters having custody of the originals (for example, "The Adjutant General's Office, official copy"), may be admitted in evidence equally with the originals thereof before any military court, commission, or board, or in any administrative matter under the War Department, provided the originals would be admissible under the rules of evidence.

NOTE.—It is to be borne in mind that the mere fact that a document is an official report does not in itself make it admissible in evidence. It must be admissible, if at all, either under the general rules of evidence or under some specific provision of law or of this Manual.

(RULE 3:)

238a. Certain Official Writings Are Evidence of Facts Recited Therein.—Where an official duty or authority exists to record certain facts and events, the writing containing the evidence is competent (i. e., prima facie) evidence of the facts and events recorded in it, without calling to the stand the officer who made it. For instance, the original of an enlistment paper, the physical examination paper, outline-figure and finger-print card, and the original morning re-

port sheet are competent evidence of the facts recited in them. (A descriptive and assignment card, however, is not an original paper. All the information it contains is compiled from other original sources, and therefore it is not evidence of the facts recited in it.)

(RULE 4:)

239. AUTHENTICATION OF WRITINGS.—In order to prove that a writing is what it purports to be, in case of a private letter, the person who received the letter should testify that he received it and he should identify it. Then it should be proved that the signature is in the handwriting of the purported writer of the letter. But in proving the genuineness of letters the rule is that the arrival by mail of a reply purporting to be from the addressee of a prior letter duly addressed and mailed, is sufficient evidence of the genuineness of the reply to justify its introduction in evidence. A similar rule prevails as to telegrams purporting to be from the addressee of a prior telegram or telephone message.

If the writing is an official document such as a pay voucher, the person having official custody should produce it in court and testify that he is the custodian of the writing and that it is the pay voucher of the person whose name is signed. The signature to the voucher should be proved to be genuine if that is not admitted. In court-martial practice the opposing party usually admits a public document without requiring such strict proof. The entries in pay vouchers, muster and pay rolls, company morning reports, and other public records used in the Army, are open to inspection by both parties, and contain numerous entries not pertaining to the case being tried. It is the practice, in the absence of an objection, to prove their contents by the oral testimony of a witness, usually the custodian, reading the material matter in court.

240. COMPARISON OF HANDWRITING.—The common-law rule of evidence would not permit a comparison of handwriting unless the writing to be used as a standard was properly in the case for other purposes than mere comparison. This rule

was changed by act of Congress approved February 26, 1913 (37 Stat., 683), which provides—

That in any proceeding before a court or judicial officer of the United States where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses, or by the jury, court, or officer conducting such proceding, to prove or disprove such genuineness.

But before admitting such specimens of handwriting, satisfactory evidence should be offered as to the genuineness of the same.

The rule prescribed by Congress will govern in court-martial procedure.

241. Use of Memoranda.—Memoranda may be used to aid the memory or to supply facts once known but now forgotten. Memoranda are therefore of two sorts: First, if the witness does not actually remember the facts but relies on the memorandum exclusively (as in the case of a bookkeeper using an old account book), then the witness must be able to guarantee that the record accurately represented his knowledge and recollection at the time of its making, but it is not necessary that he should himself have made the record if he can state from his present recollection that it was correct when made and the entries must have been made at or near the time, and the recollection at such time must have been fresh as to the facts recorded. Second, if the witness can actually remember the facts and merely needs the memorandum to stimulate or revive his memory, or a part of it, then the above limitations do not strictly apply. But the court should see to it that no attempt is made to use such a paper to impose a false memory on the court under guise of refreshing it.

The memorandum to be used must always, on demand, be shown to the opponent for purposes of inspection and cross-examination, and fairness and justice require that where a memorandum is consulted before trial for refreshing a witness's recollection, statement should be made by the trial judge advocate or counsel to that effect, and the memorandum should be brought into court by the side whose witness has so consulted it.

242. Memorandum as Evidence.—Where a memorandum does not serve to refresh the recollection of the witness, but he can state that it was made when his memory was fresh and can give the guaranty of accuracy and recollection called for by the preceding section, the memorandum itself will be admissible. Where the witness's certainty rests on his usual habit or course of business in making memoranda or records, it is sufficient.

243. Memorandum for Refreshing Recollection.—Where a witness states that the memorandum to be used refreshes his recollection to the extent of his now remembering the data contained therein, the common rule is to have him testify as to such facts without admitting in evidence the memorandum itself.

244. Books of Account.—Entries in books of account, where such books are proven to have been kept in the regular course of business, and the entrant is dead, insane, out of the jurisdiction of the court, or otherwise unavailable to testify, are admissible as evidence. Also the lack of an entry in a series of written entries is admissible as an implied statement that no events occurred of the kind that would have been recorded.

Where the entrant is available to testify in court, books of account will be used, just as memoranda are used for the purpose of refreshing the recollection of the witness, and may be introduced in evidence in connection with his testimony.

Where the entrant only records an oral report or written memorandum made in the regular course of business by another person or persons, such other person or persons, if available, must be called to testify.

The original document of entry must be produced or accounted for. Where a composite entry is used, the extent to which intermediate memoranda must be produced depends on the circumstances of each case. As between ledger and daybook or other kinds, the book required is that which contains the first regular and collected record of the transactions. (Wigmore, sec. 1530.)

245. MAPS, PHOTOGRAPHS, ETC.—Maps, photographs, sketches, etc., as to localities, wounds, etc., are admissible as evidence when properly verified by (1) the party that made them, or (2) by anyone personally acquainted with the locality, object, person, etc., thereby represented or pictured, and able to state their correctness, from his own personal knowledge or observation, or (3) when coming from official sources that are a guaranty of truthfulness and accuracy. This character of evidence is capable of gross misrepresentation of facts and should be carefully scrutinized. Finger prints, upon such verification or guaranty, are admissible.

SECTION V.

EXAMINATION OF WITNESSES.

246. WITNESSES EXAMINED APART FROM EACH OTHER.—Witnesses, after having been first sworn as provided in paragraph 134, are usually examined apart from each other, no witness being allowed to be present during the examination of another who is called before him. But this rule is not inflexible; it is in practice subject to the discretion of the court, nor is it ever so rigidly observed as to exclude the testimony of a person because he has been present at the examination of other witnesses; but the fact of such presence may be commented upon in argument by either party, in relation to the weight to be given the evidence of the witness.

247. OBJECTIONS TO COMPETENCY; WHEN MADE.—Any objection to the witness's competency should be made before he is sworn. If his incompetency should later appear, however, a valid objection should be sustained, or the court, of its own motion, should refuse to hear him further, and order that any testimony he may have already given will be disregarded.

248. NUMBER OF WITNESSES REQUIRED.—Though there are occasional dangers in trusting to a single witness, the testimony of a single qualified witness to the facts in issue would suffice to sustain a conviction, except as to (1) treason, where there must be two witnesses testifying credibly to the same overt act, or (2) perjury, where there must be either (*a*) a

second witness to the falsity alleged or (*b*) a corroboration of a single witness by some other form of evidence. The rule as to perjury does not apply, however, where the falsity can be inferred from a contradictory statement made by the accused. (Wigmore's P. C., 338, 339.) For instance, where a person is charged with a perjury as to facts directly disproved by documentary or written testimony springing from himself, with circumstances showing the corrupt intent; in cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath; and in cases where the false swearing can be proved by his own letters relating to the fact sworn to, or by other written testimony existing and being found in the possession of a defendant and which has been treated by him as containing the evidence of the fact recited in it. (U. S. *v.* Wood, 14 Pet., 430.)

(See par. 224 as to corroboration of an accomplice and see par. 225 as to corroboration of a confession.)

249. Order of Examination of Witnesses.—The proper and usual order and sequence of examination of witnesses contemplates that the witnesses for the prosecution shall be called first and then the witnesses for the accused, and afterwards the witnesses for the prosecution in rebuttal of testimony brought out by the accused, and then the witnesses for the accused in rebuttal of those last introduced by the prosecution, and then witnesses by the court; and that the method of examining each witness shall be direct examination, cross-examination, redirect examination, recross-examination, and examination by the court. However, the court may, in the interest of truth and justice, call or recall witnesses, or permit their recall at any stage of the proceedings; it may permit material testimony to be introduced by either party quite out of its regular order and place, or permit a case once closed by either or both sides to be reopened for the introduction of testimony previously omitted, if convinced that such testimony is so material that its omission would leave the investigation incomplete. In all such cases both parties must be present, and any testimony thus received would be subject to cross-examination and rebuttal by the party to whom it may be adverse.

250. DIRECT EXAMINATION—Identification of Accused.—The first question to be asked each witness, whether called for the prosecution or defense or by the court, will be, whether he knows the accused, and if he does to state who he is. This question is always asked by the trial judge advocate. The accused having been identified, the examination of the witness is continued by the person calling him. All questions and answers are recorded in full, and as far as possible in the exact language of the witness. If an objection is made to a question, the reason for the objection will be stated.

The identification of the accused should be carefully proved, both for the establishment of the court's jurisdiction over him, and also for the proof of his actual complicity in the offense where any doubt is raised on this point. Attention is here called to the specific modes mentioned in paragraph 223a supra (identification), and paragraph 239 supra (documents), and to the proof of the allegations required by paragraph 74b to be made in the specifications, as to the accused's name, rank or grade, title, and organization.

251. CROSS-EXAMINATION.—In general the cross-examination will be limited to matters brought out by the direct examination of the witness, but in the discretion of the court exceptions may be made to this rule. As it is the purpose of the cross-examination to test the credibility of the witness it is permissible to investigate the situation of the witness with respect to the parties and to the subject of the litigation, his interest, his motives, inclinations, and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory, and description. Leading questions may be freely used on cross-examination. (Davis, p. 285.)

252. REDIRECT AND RECROSS-EXAMINATION.—Ordinarily the redirect examination will be confined to matters brought out on the cross-examination, and the recross-examination will be confined to matters brought out on the redirect examination. But in these matters the court, in the interest of truth and justice, should be liberal in relaxing the rule.

253. EXAMINATION BY THE COURT.—The court or a member may ask questions of a witness when it is apparent that the

examination of the witness already made has failed to bring out matters material to the issues, and for the same reasons a witness may be recalled or a new witness summoned by the court.

253a. Questions by Members of the Court.—Questions asked by members of the court and testimony sought or elicited thereby are subject to the same rules of evidence as though the questions had been proposed by the trial judge advocate or counsel for the accused, and are subject to objection by either party or by another member of the court in the same manner as questions asked by the trial judge advocate or the defense. No questions should be asked by a member of the court of any witness called by either party, nor permitted to be answered, which under the rules of evidence, neither of the parties could ask. It is the duty of members of the court to carefully observe the rules of evidence in any questions they may ask, and the duty of the court to enforce the rules, of its own motion, and without waiting for objection from either party, more carefully, if anything, against questions asked by the president or by any other member of the court than against questions asked by the trial judge advocate or counsel for the accused, because of the natural hesitancy of the parties themselves to object to questions asked by a member of the court, and because improper testimony elicited through questions by members of the court is likely to have more weight, and any error in admitting it likely to be more seriously prejudicial to the accused than if brought out by questions of the parties. If new matter be elicited by questions of the court, the party toward whom such new matter is unfavorable, will be permitted to cross-examine thereon, whether or not the witness was called by him.

254. Leading Questions—Double Questions.—(a) Leading Questions.—Leading questions; that is, questions which either (1) suggest the answer it is desired the witness shall make, or (2) which, embodying a material fact, are susceptible of being answered by a simple yes or no, must not be asked on direct examination of a witness by the party calling him. For example, the question, "Did you hear the accused say he did not intend to come back?" would be leading. The proper form of the question would be: "Did the accused say

anything?" If the answer is in the affirmative, add "State what he said." Or, where a knife is introduced in evidence a witness should not be asked on direct examination whether that is the knife he saw the accused stab Pvt. A. with, but he should be asked first whether he recognizes the knife, and if he answers that he does, then he may be asked where he saw it, and what was done with it, etc.

(b) Double Questions.—Double questions are questions embodying two or more separate elements or questions. Double questions must not be asked either on direct or cross-examination, since they are always confusing to a witness, frequently leading to misunderstanding and unintentional misstatements by the witness; and since, furthermore, particularly if asked on cross-examination in the form of a leading question to which a direct answer yes or no may be demanded, a double question may constitute a trap for the witness. Such a question may, in fact, not be susceptible of a categorical answer either yes or no. It will therefore never be permitted to be asked. For example, the question "Did you see the accused leave his quarters with a bundle under his arm?" is, besides being leading, a double question, and may not be susceptible of a categorical answer yes or no. It consists, really, of three questions, viz: (1) Did you see the accused? (2) If so, was he leaving his quarters when you saw him? and (3) if so, did he have a bundle under his arm? Manifestly the witness may have seen the accused, at the particular time in question, and yet not have seen him leave his quarters, and not have seen him with a bundle under his arm; or he may have seen him leave his quarters but without a bundle under his arm, or he may have seen him with a bundle under his arm but not leaving his quarters; or again he may have seen him (either leaving his quarters or otherwise) with a bundle, but not under his arm. Each of these various circumstances may, very possibly, have a material bearing on the case. The injustice of such a question, both to the witness and to the accused, and its misleading effect, is apparent from a consideration of the fact that if the witness be required to answer yes or no to such a question he may, for instance, answer "no," meaning simply that the accused when he saw him did not have a bundle under his arm, or perhaps meaning that although he saw the accused

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with a bundle under his arm he was not then in the act of leaving his quarters. But the negative answer may be construed as a complete denial of having seen the accused at all. On the other hand, if he should answer "yes" to the question, he might mean simply that he saw the accused at the time in question, or saw him leaving his quarters, whereas his answer would be quite properly construed as meaning that he not only saw him at the time in question but also in the act of leaving his quarters, and with a bundle, and also that the bundle was under his arm. Such a question will never be permitted to be asked of a witness at any time or under any circumstances.

(c) The following are exceptions to the rule that leading questions will not be asked:

(1) Leading questions may be asked on cross-examination.

(2) To abridge the proceedings, the witness may be led at once to points on which he is to testify. The rule is therefore not applicable to that part of the examination of a witness which is purely introductory. For example, in a desertion case, a policeman, who apprehended the accused, may have his attention directed at once to the occasion by such a question as whether at a certain time and place he arrested the accused, but it is improper to include in such a preliminary question anything which may bear on the merits of the controversy, as, e. g., that he arrested the accused as a deserter. (The grounds of the arrest, if material, should be brought out by other—not leading—questions, as, for example, "What did you say to the accused when you arrested him?") The witness having answered the question in the affirmative, in the next question he might properly be asked to state the details connected with the arrest. So a witness might properly be asked whether he was present at a certain place where and time when the accused was placed in arrest by a certain officer (unless the fact of the arrest be also disputed). The witness having answered in the affirmative, he may be asked to state all the circumstances.

(3) When the witness appears to be hostile to the party calling him or is manifestly unwilling to give evidence, the court may, in its discretion, permit the party calling him to put leading questions.

(4) When there is an erroneous statement in the testimony of the witness, evidently caused by want of recollection, which a suggestion may assist, as, for instance, where he misstates a date or an hour (provided, no attempt is made to get him to change his mind, but only an opportunity offered to correct, if he desires, what appears manifestly to be a mere slip of the tongue).

(5) Where, from the nature of the case, the mind of the witness can not be directed to the subject of the inquiry without a particular specification of it, as where he is called to contradict another witness who has testified that the accused made a certain statement on a certain occasion in the hearing of a number of soldiers, each of them may be asked whether he heard the accused make the statement.

The court, in its discretion, would be justified in allowing liberal departures from the rule; but must always be careful, in so doing (a) not to allow an untruthful witness an opportunity to reshape his testimony as he thinks counsel desires, or the reverse, or to try to match it up with the testimony of other witnesses, from suggestions he may gather during his examination, and (b) not to allow either the trial judge advocate or counsel for the accused, on direct examination, to intimate to a witness that his testimony on a material point is wrong, or ought to be changed (except within the limits of the rules above stated).

255. Recalling of Witnesses.—Where a witness is recalled to the witness stand he will not be sworn again, but will be reminded that he has been sworn in the case and is still under oath. A failure to so remind him, however, does not affect the validity of the trial and will not be ground for rejecting the testimony.

Section VI.

CREDIBILITY OF WITNESSES.

256. What Credibility Consists in.—The credibility of a witness is his worthiness of belief, and is determined by his character, by the acuteness of his powers of observation, the accuracy and retentiveness of his memory, by his general manner is giving evidence, his relation to the matter in issue,

his appearance and deportment, prejudices, by his general reputation for truth and veracity in the community where he lives, by comparison of his testimony with other statements made by him out of court, by comparison of his testimony with that of others, etc. From all these the court will draw its own conclusions as to the credibilty of the witness, attaching only such weight to his evidence as all the facts seem to warrant. There may even be cases in which the court will reject all the testimony of a witness. This may be for any of the reasons set forth above. No statement will be made by the court of the weight given to any testimony or the amount rejected, except as it may desire to inform the reviewing authority of the reasons which have led to its findings.

257. Proof of Character by General Reputation.—Where impeachment of a witness for bad character is undertaken it must be limited to proof of his general reputation for truth and veracity in the community in which he lives or pursues his ordinary vocation. For a military man this would mean the reputation that he bore amongst the members of his regiment or company, or organization or command, or amongst those stationed at a post, or, if stationed at or near a town, amongst the residents of the town. Personal opinion as to his character is not admissible, except that a witness may, after testifying that he knows the reputation of the person in question as to truth and veracity in the community in which he so resides or pursues his ordinary avocation, and that such reputation is bad, be further asked whether or not from his knowledge of such reputation he would believe the person in question on oath.

258. Conviction of Crime.—Evidence of the conviction of any crime, even by a foreign tribunal and whether felony or misdemeanor, is admissible for the purpose of diminishing the credit due to his testimony. (1 Greenleaf, sec. 376.) It is allowable to ask a witness on cross-examination whether he has ever been convicted of a crime, but if he denies it, proof may only be made by copy of the record of his conviction.

258a. Corroborative Statements—Identification of Accused.—In general, a witness gains no corroboration merely by repeat-

ing his statements a number of times to the same effect. Hence, similar statements made by a witness prior to the trial consistent with his present testimony are in general not admissible to corroborate him. But this is only a general rule, and there are some situations in which such statements, having a real evidential value, are admissible. For example, if a witness's testimony is impeached on the ground of bias due to a quarrel with the accused, the fact that he made an assertion similar to his present testimony before the date of the quarrel tends to show that his present testimony is not due to bias. So, also, where his testimony is sought to be impeached on the ground of collusion or corruption, the circumstances of the case may show whether such statements should be admissible as having such evidential value.

259. Contradiction by Other Witnesses.—A witness may be impeached by calling other witnesses to contradict some part of his testimony. How seriously this may affect his credibility is a matter to be determined by the tribunal upon weighing all the circumstances. Assuming that the tribunal believes the fact to be as asserted by the contradicting witness, it does not follow that the contradicted witness is to be wholly discredited; his misstatement may have been due to error of memory or observation on that particular point, and not necessarily to deliberate falsehood; and he may even have falsified on that particular point and still be speaking the truth on other points. So that no general rule can be laid down as to the effect to be given to a proved error on one point; the court is to determine the credibility of the witness on other points in the light of all the circumstances.

But this mode of impeachment by calling other witnesses to contradict is subject to one important limitation, viz, the matter upon which the contradiction is offered must not be a collateral one. The object of this rule is to prevent the prolongation of the trial and the confusion of the main issues by entering into numerous controversies on minor matters which are not material to the case and do not throw substantial light on the credibility of the witnesses as to the main issues. Whether a matter is thus "collateral" depends largely on the circumstances of each case. For example, in a trial for escape, where a witness for the prosecution incidentally states that he had seen the accused and two others, naming them, buying cigarettes at the post exchange at 4

p. m. the day before the alleged escape, contradiction as to the purchase being of cigars and not cigarettes would ordinarily be deemed collateral.

But if the case was one of conspiracy to escape, and the identity of one of the conspirators was in dispute, and a certain brand of cigarettes was found in the possession of all three accused, then presumably the contradiction as to the purchase being of cigars and not cigarettes would cease to be collateral. The court's discretion must here be used to allow such liberality in construing "collateral" as will best tend to reveal the credibility of the witness in all its aspects.

NOTE.—By "collateral facts" is meant facts not material to any issue in the case on trial. As to facts material to the issues in the case, any contradictory statements made by the witness out of court may be shown by the testimony of other witnesses. (See par. 262, infra.)

260. Inconsistent Statements.—A witness may be impeached by showing that he has made elsewhere statements inconsistent with his testimony on the stand. Such inconsistent statements may be evidenced by asking the accused on cross examination to state whether he made them, or by calling other witnesses who will testify to them.

But if the proof is desired to be made in the second manner mentioned, the following two limitations apply and must be strictly observed:

(a) The matter to which the self-contradictory statement refers must not be a collateral one: "collateral" here being construed in the same sense as in paragraph 259, the same policy being involved.

(b) While the witness desired to be impeached is on the stand for cross-examination his attention must be called to the supposed statement, by mention of the time, place, person addressed, and subject, so that he may then and there have an opportunity to deny it or to explain it, if he sees fit. For the purpose of thus calling his attention, he may be recalled to the stand if he had already left it. If the supposed statement is contained in a writing, this also must be mentioned, and he may be asked to identify his signature on it, and thus save calling another witness to prove the signature. But it is not necessary in thus calling his attention to a writing to show him the contents of

the writing or any part of it other than the signature. If he then admits the signature, or if the signature is later proved by another witness, the writing is to be introduced at the proper time later, when the cross-examiner is putting in his own case.

The witness may of course make any explanation he desires as to the supposed statement, either on cross-examination when his attention is called to it, or on recall for the purpose when it has been evidenced by calling other witnesses.

261. PREJUDICE, BIAS, ETC.—Prejudice, bias, relationship, etc., may be shown to diminish the credibility of the witness, either by the testimony of other witnesses or by cross-examination of the witness himself. Such matters are never regarded as collateral.

262. CREDIBILITY OF ACCUSED AS A WITNESS.—If the accused testifies, his credibility as a witness may be attacked on any of the grounds stated in the preceding paragraphs.

NOTE.—If the contradictory statement was made in the course of another trial, so much only of the testimony or record of such other trial should be offered as shows the contradictory statement; it would not ordinarily be proper to offer the whole record of that case. (C. M. 134184, Benson, June 25, 1919; C. M. 134268, Shannahan, June 26, 1919.)

262½. IMPEACHMENT OF ONE'S OWN WITNESS.—The general rule is that a party can not impeach his own witness. This is subject to but few exceptions; as, where a party is compelled to call a witness whom the law, or circumstances of the case, make indispensable, or where a witness proves unexpectedly hostile in his testimony on the stand. In such excepted cases the impeaching party must first show that the evidence as given has taken him by surprise, and that the witness is hostile. The witness may then be asked if he has made contradictory statements out of court, the time, place, and circumstances of the statement being described to him in detail, and upon his denial witnesses may be called in proof that he did make them. In order that one's own witness may be contradicted, mere silence or ignorance on his part is not sufficient. While a party taken by surprise may impeach his own witness in the cases indicated, he is not permitted to attack his reputation by showing that his general character is bad.

SECTION VII.

DEPOSITIONS AND FORMER TESTIMONY.

263. DEPOSITIONS ADMISSIBLE.—Depositions taken under the provisions of A. W. 25 and 26 "may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or military board." (A. W. 25.)

NOTE.—A case referred to a special court-martial for trial under the second proviso of A. W. 12 is not "a capital case" within the meaning of this paragraph or of A. W. 25, since the special court-martial has no power to impose the death penalty.

264. DEPOSITIONS FOR DEFENSE IN CAPITAL CASES.—Deposition testimony may be adduced for the defense in capital cases. (A. W. 25.) Where the defense calls for such testimony in capital cases the witnesses may be cross-examined as fully as witnesses in a case not capital.

265. OBJECTIONS AS TO COMPETENCY OF WITNESS AND ADMISSIBILITY OF EVIDENCE.—The same rules as to competency of witnesses and admissibility of evidence apply in the taking of evidence by deposition that apply in the examination of a witness before the court, except that a wider latitude than usual should be allowed as to leading questions.

If the interrogatories and cross-interrogatories for depositions are prepared for acceptance by the court, in open session, objection to the competency of the deponent, if grounds of objection are known at the time, as well as objections to questions, should be raised at such session, and ordinarily be passed upon by the court at that time. The court should, however, in the interests of justice, entertain such objections when the depositions are offered in evidence, but might in a proper case call upon the trial judge advocate or counsel for explanation as to why they had failed to make the objection at the proper time.

If the interrogatories and cross-interrogatories are agreed upon by both parties in advance of the assembling of the court—and this is the usual practice—objections to questions and to the admissibility of evidence will be made when the depositions are offered in evidence.

266. Examination of Deposition by Counsel.—Upon receipt of the deposition the trial judge advocate will advise the accused or his counsel of that fact and will give them an opportunity to examine the deposition before the trial.

267. Reading of Depositions.—Ordinarily depositions will be read to the court by the party in whose behalf they are taken, but if the accused is not represented by counsel the trial judge advocate will read to the court the deposition taken on his behalf, unless the accused requests to read them, or does not desire to offer them. (See par. 268, infra.) After being read to the court a deposition will be properly marked for identification purposes and attached to the record, and the record will show that it has been introduced and read to the court.

268. Miscellaneous Provisions as to Depositions.—The party at whose instance a deposition has been taken is not required to offer it, unless he sees fit to do so. If the party at whose instance a deposition has been taken decides not to put it in, the opposite party may (subject to the general rules as to competency, materiality, and relevancy of evidence) offer in evidence either the whole or any competent or relevant part of it which is not clearly fragmentary and misleading, as he may see fit, and in such case the party on whose behalf it was taken may put in evidence any other like part.

The trial judge advocate should not be permitted (except as stated in the last clause of the preceding sentence) to introduce only such parts of a deposition taken at his instance as are favorable to him or as he may elect to use; he must offer such a deposition in evidence as a whole or not offer it at all; the accused, however, will be permitted to offer either the whole of a deposition taken on his behalf or any competent or relevant part of it which is not clearly fragmentary and misleading, as he may see fit, and in such case the trial judge advocate may put in evidence any other like part. The court may direct either the whole or any competent part of a deposition, not clearly fragmentary and misleading, if not offered in evidence by either party, to be read as evidence for the court and not on behalf of either party, and in such case either party may offer and put in evidence any other like part or parts.

NOTE.—Upon the reading of a deposition or any part of it offered in evidence by either party, or on behalf of the court, under any of the provisions of this paragraph, any question or answer or exhibit or any part thereof, which may not be properly admissible under the general rules of evidence, may be omitted, or ordered suppressed and disregarded either upon the motion or the objection of the party offering it, or of the opposite party, or of any member of the court.

269. AFFIDAVITS NOT ADMISSIBLE.—Affidavits taken without notice and not as depositions under the provisions of A. W. 25 and 26 are in no case admissible as evidence unless expressly consented to by the trial judge advocate and the accused with full knowledge of his rights.

270. CERTIFICATE OF DISCHARGE.—The "certificate of discharge" may be used by the defense, either before or after the findings, for proof of good character.

271. STATEMENT OF SERVICE.—The statement of service of the accused, as found on the front page of the charge sheet, will not be permitted to be seen or examined by members of the general or special court-martial trying him until after they have reached their findings. In the event of conviction the accused will be asked whether such statement of service is correct, and such statement will be examined and considered by the court, together with the evidence of previous convictions of the accused, if any, for the purpose of determining proper punishment in view of length of service. (See pars. 306 and 307 infra.)

The statement of service may, nevertheless, be used by the defense, either before or after the findings, for proof of good character.

272. FORMER TESTIMONY BEFORE COURT OF INQUIRY.—The record of the proceedings of a court of inquiry may, with the consent of the accused, be read in evidence before any court-martial or military commission in any case not capital nor extending to the dismissal of an officer, and may also be read in evidence in any proceeding before a court of inquiry or a military board: *Provided*, That such evidence may be adduced by the defense in capital cases or cases extending to the dismissal of an officer. (A. W. 27.)

The same tests of admissibility laid down in paragraph 275, infra, as to examination and cross-examination on the same

issues, and as to correctness and completeness of the record, where former testimony before civil courts and courts-martial is offered, will be applied where a record of a court of inquiry is offered.

NOTE.—"Any Case Not Capital nor Extending to the Dismissal of an Officer."—No case referred to a special court-martial for trial under the provisions of the second proviso to A. W. 12 as amended by the code of 1920 is within the meaning of this phrase as used in this paragraph, since the special court-martial has no power either to impose a death sentence or to sentence an officer to dismissal.

273. Evidence of Pardon.—When a special plea in bar of trial, based on a pardon, is offered by the defense, the best evidence of such pardon, if in the nature of an individual pardon, will be the document signed by the President himself, and, if in the nature of a general amnesty, by an official copy of the proclamation or order publishing such amnesty. If such document or order is not sufficiently explicit to determine whether or not the offense for which the accused is on trial is the same as that covered by the pardon, then other evidence must be introduced to fill the gap. Where the pardon is in the nature of a constructive pardon, the evidence will be of such facts and circumstances as it is contended constitute such pardon.

274. Evidence of Former Trial by Court-Martial or Civil Court.—Where a plea in bar of trial, based on a former trial by court-martial for the same offense and conviction or acquittal of the same, is offered for the defense the best evidence of such conviction or acquittal will be the order of the reviewing authority publishing the case. Where such order is not sufficiently explicit to determine whether or not the offense for which the accused is on trial is the same as that the conviction or acquittal of which he pleads in bar, then the original court-martial record should be offered in evidence.

Where a plea in bar is on a former trial and conviction or acquittal by a Federal court—the action of a State or any other than a Federal court does not operate as a bar to second trial—the best evidence of such conviction or acquittal will be a duly certified copy of the indictment and findings and conviction or acquittal, given by the public officer whose duty it is to keep the original.

275. Former testimony in civil courts and courts-martial.—Where a witness, who has testified in either a Federal or State court at a former trial of the same person, on the same issues raised in the case on trial, and was fully examined and cross-examined, is dead or is beyond reach of the process of the court and his personal attendance can not be secured, then the stenographic report of his testimony, if proven to be correct and complete by the person by whom it was reported, will be admissible and may very properly be accorded the same weight as a deposition duly taken on notice. (Ry. Co. *v.* Myers, 80 Fed. Rep., 361, 365.) Ordinarily, however, this situation should be met by the trial judge advocate and counsel for accused procuring in advance of trial a transcript of the stenographer's notes, duly sworn to by him as correct and complete, and submitting it to the opposite party for his inspection. If acknowledged to be correct and complete, then such transcript will be received in evidence.

Where the testimony desired is of a witness who had testified in a former trial by court-martial, all conditions being approximately the same as those cited in the first paragraph of this section, so much of the original court-martial record itself as contains the desired testimony may be read in evidence, subject in all cases to the provisions of paragraph 377a infra, and the stenographic reporter will only be called where a question is raised as to the correctness or completeness of the recorded testimony.

Section VIII.

PRESUMPTION.

276. Presumptions.—Presumptions constitute a large part of the law of evidence. They are of two kinds—presumptions of law and presumptions of fact.

277. Presumptions of Law.—Broadly speaking, a presumption of law is a rule of law that when certain circumstances exist the court must presume certain other circumstances. Presumptions of law are divided into conclusive and disputable presumptions. In case of a conclusive pre-

sumption of law the presumption can not be contradicted. For example, all residents of a country are conclusively presumed to know its laws. This presumption is in force in the practice of courts-martial so far as concerns offenses that constitute civil crimes. (As to the modification of the rule as regards knowledge of the Articles of War in case of recruits, see par. 282; as to intent, par. 281; as to ignorance of law, par. 282.) In case of a disputable presumption of law, the presumption can be contradicted. For example, it is presumed that a sane person intends the natural and probable consequences of his acts; a person is presumed to be innocent until proven guilty; all persons are presumed to be sane; persons acting as public officers are presumed to be legally in office and to properly perform their duties; and malice is presumed from the use of a deadly weapon. Evidence may be introduced to rebut such presumptions.

278. Presumptions of Fact.—Presumptions of fact are nothing more than logical inferences, from facts already proved, as to the existence of other facts. This kind of a presumption is not made as a rule of law but as a matter of human reason. All evidence in a case, except that which directly proves the allegations in the specifications, leads at once to presumptions of fact. Such presumptions are the basis of all circumstantial evidence. (See pars. 203 and 204.) It is in making such presumptions that the members of the court should especially exercise their common sense and their knowledge of human nature and the ways of the world. Facts in evidence showing a motive or absence of motive on the part of the accused, preparations, or the absence of preparations for the commission of crime, a failure to account for suspicious circumstances, acts showing a criminal consciousness (as concealment, disguise, or flight), the suppression of evidence, the possession of weapons or instruments that might have been used in the commission of the offense, the possession soon after larceny or embezzlement of the articles stolen or embezzled, are a proper basis for presumptions of fact.

Also where the existence at one time of a certain condition or state of things of a continuing nature is shown, the general

presumption arises that such condition or state continues to exist, until the contrary is shown, so long as is usual with conditions or things of that particular nature. For example, there is a presumption of continuance as to one's residence, until a change is shown, also that one holding an office continues to hold it until the end of the term for which appointed or elected and that personal habits have not changed. There is a presumption of fact from the regular course of business in the Post Office Department that a letter when properly deposited in a post-office box or in the place in which letters for mailing are usually deposited, postage prepaid, is received by the addressee. The presumption with regard to the delivery of letters duly posted has been extended and applied to the delivery of telegrams deposited with a telegraph company for transmission; but delivery of the message to the telegraph company must of course be shown. There is also a presumption of fact that persons of the same name are the same person. The strength of this presumption will of course depend upon how common the name is and other circumstances.

279. Prima Facie Evidence.—Prima facie evidence is that which suffices for the proof of a particular fact until contradicted and overcome by other evidence. In other words, prima facie evidence justifies the court in finding the facts presumed, but in view of the doctrine of reasonable doubt that always inures to the benefit of the accused from a consideration of all of the evidence presented the court is not required to find the facts presumed. The court may decide, for instance, that the prima facie evidence presented does not outweigh the presumption of innocence.

280. Intent in Connection with Crimes.—In respect to the element of intent, crimes are distinguished as follows: Those in which a distinct and specific intent, independent of the mere act, is essential to constitute the offense, as murder, larceny, burglary, desertion, and mutiny; and those in which the act is the principal feature, the existence of the wrongful intent being simply inferable therefrom, as rape, perjury, sleeping on post, drunkenness on duty, neglect of duty. In cases of the former class the characteristic intent

must be established affirmatively as a separate fact; in the latter class of cases it is only necessary to prove the unlawful act, for every man is presumed in law to have intended to do what he actually does, and the burden of proof is upon him to show the contrary. (Winthrop, p. 475.)

281. Intent in Military Cases.—Military offenses being created by statute, the peculiar statutory intent described in the article, if there be one, must be alleged in the specification. The enlistments prohibited in A. W. 54, for example, must have been *knowingly* made in order to constitute an offense under the statute. It is similarly essential to some of the offenses described in A. W. 55, 56, and 57 that they be *knowingly* committed; offenses under A. W. 83 and 84 must have been committed "willfully" or "through neglect"; an officer quitting his post on tender of resignation must do so "with intent to absent himself permanently therefrom" to be triable for the offense described in A. W. 28; and an officer who refuses or "willfully neglects" to deliver an offender to the civil authorities upon application duly made by such authorities subjects himself by such refusal or willful neglect to the penalties set forth in A. W. 74. (Davis, 642.)

In some instances, however, as in the offenses described in A. W. 61 and 86, no statutory intent is set forth in the article, and none need be alleged in the specifications.

In still other cases, while no intent is expressed in the article, a particular intent is, nevertheless, implied, and is, therefore, an essential element of the offense, and though not required to be alleged in the specification, must be established in evidence. Such is the case with respect to the offense of desertion, the requisite intent being either not to return, to avoid hazardous duty, or to shirk important service.

But whether the intent is that presumed from the commission of an unlawful act or is the specific one express or implied in the article in either case the prosecution must prove such actual intent. If the evidence does not substantiate such intent, the accused must be acquitted, or the grade of the offense reduced, as, for instance, from assault with intent to kill, to assault. (See also pars. 74b, 158a, and 158b, supra.)

282. Ignorance of Law.—Every person is usually presumed to know the provisions of Federal, State, and municipal law applicable to the community in which he lives, and a person subject to military law is presumed, in addition thereto, to know the statute law, as particularly applicable to the Army, as well as Army regulations, the different manuals, orders, and circulars issued for the information and government of the Army. This really means that on grounds of public policy a person is responsible whether he knows the law or not. His ignorance is immaterial.

An exception may sometimes be made where enlisted men are charged with the knowledge of the Articles of War. This exception would be based primarily upon the fact that A. W. 110 makes it one of the features of enlistments into the military service that certain of the "Articles of War shall be read to every enlisted man at the time of, or within six days after, his enlistment." A. W. 109 enjoins that he shall take an enlistment oath in which, among other things, he swears that he will observe and obey military orders "according to the rules and Articles of War." While in the case of an old or reenlisted soldier, or one who had been for a considerable period in the service and had had a sufficient opportunity to inform himself as to the provisions of the code, a failure to have complied with the injunction of this article could scarcely constitute a defense, such failure might perhaps have this effect, or should usually at least act as an extenuation in the case of a recruit, especially one imperfectly acquainted with the English language. In such a case it would certainly be admissible for the accused to show the fact, and if the offense charged was one of the criminality of which he could not, in his ignorance of military law, have been aware, or the gravity of which he could not have appreciated, the omission of the reading of the articles upon his enlistment would properly be regarded by the court, if not as a defense, certainly as a palliation of his misconduct. (Winthrop, p. 438.)

283. Ignorance of Fact.—It is generally laid down that ignorance of fact excuses crime. But this must be an honest or innocent ignorance and not an ignorance which is the result

of carelessness or fault. The theory, of course, is that where a bona fide ignorance of fact exists there would be an absence of the requisite wrongful intent. The general rule applies equally to military cases, and the ignorance, to constitute a defense therein, must appear not to have proceeded from any want of vigilance, or from failure to make the inquiries or obtain the information reasonably called for by the obligations and usages of the service. Thus a soldier who neglects to report for guard or other duty because ignorant of the fact that he has been duly detailed therefor is not guilty of a breach of A. W. 61 unless his ignorance is a result of his own neglect or wrongdoing (Winthrop, p. 436); and if the soldier should disobey an order given to him by an officer in civilian clothing without the officer having first stated to the soldier that he was an officer, where the soldier did not know that he was an officer nor have reason to believe that he was an officer, then his ignorance would be an excuse for his act of disobedience which might otherwise have been a very serious offense. Of course, a soldier is presumed—it is his duty—to know the officers of his command where reasonable time and opportunity after joining the command are shown to have existed for this purpose.

NOTE.—See Insanity of accused, paragraph 219.

284. EVIDENCE OF DESERTION.—Absence without leave is usually proved by the evidence of an officer or noncommissioned officer of the company of the accused to the effect that he was absent from his organization without authority for a certain period, but if such witnesses are not available it may be proved by the entries on the morning reports. In making the latter kind of proof, that portion of the morning report (or reports) relating to the accused, or a copy of it certified by the officer having official custody thereof, showing the accused was absent without leave, beginning a certain date, and (if such is the case) was dropped as a deserter, should be attached to the proceedings as an exhibit. But the morning report, even though it refers to the accused as a "deserter," is not complete evidence of desertion; it is evidence only of absence without leave, and it is still necessary for the trial judge advocate to prove an intent to remain perma-

nently absent, or else to avoid hazardous duty or to shirk important service (A. W. 28); that is, to desert.

The condition of absence without leave having once been shown to exist will be presumed to continue in the absence of evidence to the contrary until the accused came again under military control. It is therefore necessary to prove only that the accused went absent without leave a certain date and came under military control a certain date. During the intermediate time it is presumed he was absent without leave.

If the condition of absence without leave is much prolonged, and there is no satisfactory explanation of it, the court may be justified in presuming from that alone an intent to remain permanently absent. The presumption of such intent will be strengthened by such circumstances as that the accused attempted to dispose of his uniform or other property; that substantially all his clothes were missing from his locker when his absence was discovered; that his civilian clothes were missing; that he attempted to board a train that took him away from his station; that he purchased a ticket for a distant point or was arrested or surrendered at a considerable distance from his station; that while absent he was in the neighborhood of military posts and did not surrender to the military authorities; that he was dissatisfied in his company or with the military service; that he had made remarks indicating an intention to desert the service; that he was under charges or had escaped from confinement at the time he absented himself; that just previous to absenting himself he stole or took without authority money, civilian clothes, or other property that would assist him in getting away, etc.

On the other hand, such incidents are not always inconsistent with a guilt of mere absence without leave. They should be carefully weighed by the court. Previous excellent and long service, the fact that none of the property of the accused was missing from his locker, and the fact that he was under the influence of intoxicating liquor or drugs when he absented himself, and that he continued for some time under their influence, etc., are incidents going to show there was not an intent to remain permanently absent.

NOTE.—Where, to a charge of desertion, accused files a plea denying desertion but admitting absence without leave, and pleading, by exception and substitution, not guilty of violation of the fifty-eighth article of war, but guilty of violation of the sixty-first article of war, such plea of guilty is not in itself sufficient basis for a conviction of desertion, no matter how long the absence without leave thereby admitted; since the plea, which must be taken as a whole, expressly negatives the intent to desert. In case of such a plea the court should receive evidence of the facts and circumstances and determine from the evidence before it, as upon a plea of not guilty, whether or not the accused is in fact guilty of desertion or only of the lesser included offense of absence without leave.

The fact that a reward has been paid for the apprehension of the accused as a deserter neither proves nor disproves an intent to desert, and is not admissible in evidence on that issue.

So also the opinions of witnesses as to whether the accused intended to desert and statements from them that the accused is a "deserter" or "deserted" are not only incompetent, but are valueless for any purpose to prove desertion.

(*a*) *Statutory Rules of Evidence.*—(1) A. W. 28 provides that it shall be sufficient proof of the offense of desertion by an officer that, having tendered his resignation and prior to due notice of the acceptance of the same, he quits his post or proper duties without leave and with intent to absent himself permanently therefrom.

(2) And similarly in the case of a soldier, A. W. 28 provides that it shall be sufficient proof of desertion in his case when it is proved that, without having first received a regular discharge, he again enlists in the Army or in the militia when in the service of the United States, or in the Navy or Marine Corps of the United States, or in any foreign army, and shall, further, be proof of fraudulent enlistment where the enlistment is in one of the forces of the United States mentioned above.

(3) And also, in case of any person subject to military law, A. W. 28 provides that it shall be sufficient proof of desertion when the evidence shows he quit his organization or place of duty with the intent to avoid hazardous duty or to shirk important service.

NOTE.—Subparagraphs "(1)" and "(2)" supra, do not apply to (1) warrant officers, (2) members of the Army Nurse Corps, (3) Army field clerks, nor (4) field clerks, Quartermaster Corps.

285. Drunkenness as Showing Absence of Intent.—It is a general rule of law that voluntary drunkenness is not an excuse for crime committed in that condition. But the question whether or not the accused was drunk at the time of the commission of the criminal act may be material as going to indicate what species or kind of offense was actually committed. Thus, there are crimes which can be consummated only where a peculiar and distinctive intent or a conscious deliberation or premeditation has concurred with the act which could not well be possessed or entertained by an intoxicated person. In such cases evidence of the drunken condition of the party at the time of the commission of the alleged crime is held admissible, not to excuse or extenuate the act as such, but to aid in determining whether, in view of the state of his mind, such act amounted to the specific crime charged or which of two or more crimes similar but distinguished in degree it really was in law. Thus, in cases of such offenses as larceny, robbery, burglary, and passing counterfeit money, which require for their commission a certain specific intent, evidence of drunkenness is admissible as indicating whether the offender was capable of entertaining this intent or whether his act was anything more than a mere battery, trespass, or mistake. So, upon an indictment for murder, testimony as to the drunkenness of the accused at the time of the killing may ordinarily be admitted as indicating a mental excitement, confusion, or unconsciousness incompatible under the circumstances of the case with premeditation or a deliberate intent to take life and as reducing the crime to the grade of manslaughter. On the other hand, where, to constitute the legal crime, there is required no peculiar intent—no wrongful intent other than that inferable from the act itself—as in cases of assault and battery, rape, or arson, evidence that the offender was intoxicated would, strictly, not be admissible in defense. (Winthrop, p. 440.)

Where drunkenness is pleaded as an excuse for crime such excuse should be received with caution. Drunkenness is easily simulated. It is sometimes resorted to for the purpose of stimulating the nerves to the point of committing the act. Where premeditation and intent first exist, followed by vol-

untary drunkenness and the commission of the crime during such state of drunkenness, the necessary intent to commit the crime will be presumed, whatever the state of drunkenness at the time of its commission may have been.

286. Drunkenness in Military Cases.—In military cases, evidence of drunkenness of the accused, as indicating his state of mind at the time of the alleged offense, whether it may be considered as properly affecting the issue to be tried, or only the measure of punishment to be adjudged in the event of conviction, is in practice always admitted in evidence. And where a certain knowledge or a deliberate purpose or specific intent is necessary to constitute the offense, as in cases of violations of A. W. 63 or A. W. 64, or of desertion, mutiny, or cowardice, or of fraud in violation of A. W. 94, the drunkenness, if clearly shown in evidence to have been such as to have incapacitated the accused from having that knowledge or entertaining that purpose or intent, as, for example, in cases under A. W. 63 or A. W. 64 from recognizing his superior officer to be such, or from entertaining the specific intent to disobey a lawful command, will ordinarily be treated as constituting a legal defense to the specific act charged.

In such cases, however, if the drunken act has involved a disorder or neglect of duty prejudicial to good order and military discipline, the accused may be convicted of that offense under A. W. 96. (Winthrop, p. 441.)

"It is to be noted that drunkenness, to be admitted in evidence or to constitute a defense, need not be caused by indulgence in spirituous liquors, but may, with the same effect, result from the voluntary excessive use of an intoxicating drug." (Winthrop, pp. 441–442.)

287. Proof of Drunkenness.—Upon a trial for drunkenness it is not essential to confine the testimony to a description of the conduct and demeanor of the accused, but it is admissible to ask a witness directly if the accused "was drunk," or for a witness to state that the accused "was drunk," on the occasion or under the circumstances charged. Such a statement is not viewed by the authorities as of the class of expressions of opinion which are properly ruled out on objection unless given by experts, but as a mere statement of a

matter of observation, palpable to persons in general, and so, proper to be given by any witness as a fact in his knowledge. It is preferable that all witnesses introduced to prove drunkenness should describe the conduct and demeanor of the accused in addition to giving their opinion as to whether the accused was drunk, but in every case the witness will also be asked the direct question whether the accused was or was not drunk.

288. Reasonable Doubt and Burden of Proof.—In order to convict, the court must be satisfied, beyond a reasonable doubt, that the accused is guilty as charged.

By "reasonable doubt" is intended not fanciful or ingenious doubt or conjecture but substantial, honest, conscientious doubt suggested by the material evidence in the case. It is an honest, substantial misgiving, generated by insufficiency of proof. It is not a captious doubt, nor a doubt suggested by the ingenuity of counsel or court and unwarranted by the testimony; nor is it a doubt born of a merciful inclination to permit the defendant to escape conviction, nor prompted by sympathy for him or those connected with him. The meaning of the rule is that the proof must be such as to exclude not every hypothesis or possibility of innocence but any fair and rational hypothesis except that of guilt; what is required being not an absolute or mathematical but a moral certainty. A court-martial which acquits because, upon the evidence, the accused may possibly be innocent falls as far short of appreciating the proper amount of proof required in a criminal trial as does a court which convicts because the accused is probably guilty. (Winthrop, p. 476.)

In trials before courts-martial the prosecution has upon it the burden of proving the guilt of the accused beyond a reasonable doubt, and, whatever the defense of the accused may be, this burden never changes. After the evidence is all in the court must be convinced beyond a reasonable doubt of every element necessary to constitute the offense in order to justify it in convicting the accused of the offense charged.

In collateral issues arising in the course of the trial as to the competency of witnesses, the admissibility of testimony, and the like, the burden of proof rests upon the party who

alleges incompetency or objects to the admission of particular testimony. (Davis, p. 267.)

Section IX.

JUDICIAL NOTICE.

289. Judicial Notice.—Certain kinds of facts do not need to be evidenced by the parties, because the court is empowered to recognize the existence of the facts without any formal offer of evidence. This recognition of the facts by the court, dispensing with the introduction of evidence thereon, is termed "Judicial notice."

1. In general, the matters to which the principle applies are of three sorts, viz, matters which a court is officially bound to know as a part of its own special duty and function; matters which are so notorious in common knowledge of all intelligent persons that a requirement of evidence thereon would be superfluous; matters which are so easily ascertainable in authentic form that the court may readily inform itself by reference to some accessible and authentic source of information. Of the first sort, an example is the law itself, of which the court naturally requires no proof. Of the second sort, an example would be the fact that the Philippine Islands are located in the tropics. Of the third sort, an example would be the date of the adoption of the United States Constitution, or the name of the present incumbent of the post of United States ambassador to Italy, either of which could be ascertained by consulting a reliable book of reference.

2. The principal matters upon which the court may thus be asked to take judicial notice may be listed as follows:

(1) The Constitution, treaties, and other general laws of the United States; the law of nations; the common law; the laws of the State in which the court is sitting.

(2) The great seal of the United States, and those of the several States; the seals of all Federal and State courts of record; the seal of a notary public.

(3) The ordinary divisions of time, as to years, months, weeks, days, and hours; general facts and laws of nature, in-

cluding their ordinary operations and effects; and general facts of American history and world history.

(4) The political organization of the Government of the United States and of the several States, and their chief officials; and current political conditions of war and peace.

(5) The organization of the Army, including the statutes and regulations relating thereto, the bulletins or circulars of the War Department, the Army Regulations, the provisions of this Manual and of the several other official manuals, the existence and location of military departments or corps areas, reservations, posts, and stations of troops, as published to the Army; the fact that an officer belongs to a certain organization, etc.

(6) General and special orders of the War Department; general court-martial orders; general and special orders and bulletins and circulars of the department or corps area, or other command in which the court is sitting; special and summary courts taking notice of the orders, bulletins and circulars of the commander appointing them and of all higher authority.

(7) Price of articles furnished by the Government when published to the Army in orders, bulletins, or price lists.

3. The principle of judicial notice does not require the court to take notice of all such matters of the above sorts, but authorizes the court to do so. When in a specific case the court is not entirely satisfied as to the precise tenor of the fact to be noticed, it therefore may satisfy its mind by resort to any authentic and available source of information, such as a book of statutes or regulations, a collection of general or special orders or bulletins, a dictionary, a standard work of history, or the like. This resort to authentic sources enables the court, in using the principle of judicial notice, to satisfy itself completely, where otherwise it might feel disinclined to notice the fact. For example, where the terms of a general order of a department are material, the court, though not having actually in mind the precise terms of the order, will send for and refer to the published order and thus take judicial notice of its terms. So also where a special order of the post or other command in which the court is sitting is material, the court may secure from the files of the adjutant the orig-

inal order, though not published, and satisfy itself of the exact terms. On this principle the court may enable itself to take judicial notice of numerous facts, within the above classes, on which it does not have any actual knowledge until it has resorted to a suitable authentic source of information.

The general principle underlying the foregoing instances is that the court is authorized in these general classes of matters to take judicial notice, but that it is not required to do so in a specific instance where its mind is actually in doubt as to the precise terms of the fact; and that in such a case it is at liberty to resort to an authentic source of information for the purpose of removing its doubt and of taking judicial notice. Where, for example, a general order is material, and no authentic source of information happens to be accessible, the court is not required to notice what it actually does not know and can not ascertain. On the other hand, where a special order of a post command is material, and some adequate source of information is available, such order may be judicially noticed, even though the order may not have been published in printed form so as to be available to the command at large.

In all these cases the trial judge advocate and defense counsel should endeavor to provide, ready at the trial, such authentic sources as the court may have occasion to refer to.

CHAPTER XII.

COURTS-MARTIAL—CONCLUDING INCIDENTS OF THE TRIAL.

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Section I.

STATEMENTS AND ARGUMENTS.

290. Scope of Statement.—After the introduction of evidence has been completed the accused, personally or by counsel, and whether or not he has testified as a witness, may make an unsworn verbal or written statement as to the case. If the statement is in writing it should be signed by the accused, or by counsel in his behalf, and appended to the record. The statement may consist of a brief summary or version of the evidence, with such explanation or allegation of motive, excuse, matter of extenuation, etc., as the party may desire to offer, or it may embrace, with the facts, a presentation also of the law of the case and an argument both upon the facts and the law. (Winthrop, p. 450.) Such statement is not testimony and, therefore, is not subject to cross-examination, but as a personal defense or argument, however, it may and properly should be taken into consideration by the court. (Digest, p. 506 V, H, 1.)

291. Freedom of Expression.—Entire freedom of expression in his statement to the court is allowable to an accused, and his counsel, within the bounds of courtesy and ordinary propriety, especially in his comments upon the evidence. So, an accused may be permitted to reflect within reasonable limits upon the apparent animus of his accuser or prosecutor, though a superior officer or of high rank. But an attack upon

such a superior of a personal character and not apposite to the facts of the case is not legitimate; nor is language of marked disrespect employed toward the court. Matter of this description may indeed be required by the court to be omitted by the accused as a condition to his continuing his address or filing it with the record. (Digest, p. 506, V, H, 3.)

292. Admissions.—While the statement proper can not, as previously stated, be regarded as evidence, and the accused is not in general to be held bound by the argumentative declarations it contains, yet if he, in a statement made by him personally, not by counsel, clearly and unequivocally admits in his statement certain facts material to the prosecution, such may properly be viewed by the court and reviewing authority in the case. Such facts must, of course, not be inconsistent with the plea. But admissions of this sort can scarcely in any event constitute a sufficient basis for a conviction unless supported by material testimony on the trial.

Note.—See Chapter IX, paragraph 154, as to procedure where, after a plea of guilty, the accused makes a statement inconsistent with his plea.

293. Arguments.—After the accused has made a statement, if any, arguments may be presented to the court by the trial judge advocate, the accused, and his counsel. The trial judge advocate has the right to make the opening and closing argument, but the court, in its discretion, may permit the defense to answer any new matter brought up in the closing argument of the trial judge advocate.

Section II.

FINDINGS.

294. Voting.—After the statements and arguments, if any are made, have been concluded, the court will proceed to its judgment, which consists of the findings and sentence. Voting by members of a general or special court-martial, on the findings, shall be by secret written ballot, and the junior member of the court shall in each case count the votes, and the president shall verify the count and announce the result of the ballot to the members of the court. (A. W. 31). If the ballots are in

excess of or less than the number of members of the court present at the time the vote is taken, the result will not be announced, and a new ballot will be taken. The votes of the members must be based upon and governed by the testimony in the case considered in connection with the pleadings. The charges and specifications will be voted upon in the same order that is followed in arraigning the accused, the first specification to the first charge being first voted upon, then the second, third, and thereafter in order, followed by a vote upon the charge itself; and so on with the other charges. Each member will write on his ballot, without signature, as to each specification, either (1) "guilty," or (2) "not guilty," or (3) "guilty, with exceptions or substitutions" (setting them out in full on the ballot); and as to each charge (1) "guilty," (2) "not guilty," or (3) "Not guilty, but guilty of violation of the ——— article of war," (setting it out). If the requisite number of votes of "guilty" without qualification is not received to convict the accused of the specification or charge, as prescribed in paragraph 295, infra, the accused will be found acquitted of the specification or charge; unless one or more such exceptions or substitutions have been so proposed on the ballots, in which case the president shall read all such proposals to the members of the court, together with any others which may then be proposed, and the members will then vote (each ballot to be written, without signature, "guilty," or "not guilty") on each such proposed finding with exception or substitution, in order, beginning with the one which the president considers the severest, until all have been so voted on, or one has received the requisite number of votes prescribed in paragraph 295. If none of such proposed exceptions or substitutions is adopted by the requisite number of votes prescribed, the accused shall be deemed entirely acquitted of that specification or charge. All ballots will be destroyed as soon as the result is announced, unless some member of the court desires first to verify the count, when they will be destroyed immediately after such verification.

NOTE.—For refusal to vote a member is chargeable under A. W. 96, see Chapter VII, paragraph 90a.

295. **Number of Votes Necessary to Conviction and Sentence.**—(a) **Convictions.**—All convictions, whether by general or spe-

cial court-martial may be determined by a two-thirds vote of those members present at the time the vote is taken (see par. 294, supra, and 308, infra, and notes thereto), except that no person shall by general court-martial be convicted of an offense for which the death penalty is made mandatory by law (i. e., either upon the specification or the charge), except by the concurrence of all the members of said court-martial present at the time the vote is taken. Where the death penalty is not mandatory but is discretionary a conviction may be determined by a two-thirds vote, but all of the members present at the time the vote is taken must concur in the death penalty before it can be imposed. (A. W. 43.)

(b) Sentences:

(1) Death sentence.—No person shall by general court-martial be sentenced to suffer death, except by the concurrence of all the members of said court-martial present at the time the vote is taken, and for an offense expressly made punishable by death by the articles of war. (A. W. 43.)

(2) Life imprisonment—Confinement for more than 10 years.—No person shall by general court-martial be sentenced to life imprisonment, nor to confinement for more than 10 years, except by the concurrence of three-fourths of all of the members present at the time the vote is taken. (A. W. 43.)

(3) All other sentences.—All other sentences, whether by general or special court-martial, may be determined by a two-thirds vote of those members present at the time the vote is taken. (A. W. 43.)

NOTE.—All other questions arising during the trial will be determined by a majority vote. (A. W. 43.)

296. Reasonable Doubt.—Where issues arise during the progress of a trial, as for instance as to the competency of members or witnesses, and evidence is taken, the question at issue is determined by preponderance of evidence; but in order to convict of the charges and specifications or any part of them the court must be satisfied of the guilt of the accused beyond a reasonable doubt.

Note.—For description of reasonable doubt, see Chapter XI, paragraph 288.

297. General Principles Controlling Findings.—The finding on the charge should be supported by the finding on the specification (or specifications), and the two findings should be consistent with each other. A finding of guilty on the charge would be quite inconsistent with a finding of not guilty on the specification. So a finding of guilty on a well-pleaded specification apposite to the charge, not followed by a finding of guilty either of the article charged or of some other proper article, would be incongruous. No matter how many specifications there may be, it requires a finding of guilty on but one specification (apposite to the charge) to support a similar finding upon the charge. (Digest, p. 536, XII, A. 2.) Evidence can not be taken after a finding has been reached (except as provided in par. 154(e), supra).

298. Guilty of a Lesser Included Offense.—If the evidence proves the commission of an offense which is included in that with which the accused is charged the court may except words of the specification, and if necessary substitute others instead, pronounce the innocence and guilt of the excepted and substituted words, respectively, and then find the accused either guilty of the charge or not guilty of the charge, but guilty of a violation of another proper article of war as the finding on the specification may require. Of this form of verdict the most familiar is the finding of guilty of absence without leave under a charge of desertion. In such a case the court should find as follows where the charges are in the usual form:

Of the specification, guilty except the words "desert" and "in desertion" substituting therefor respectively the words "absent himself without leave from" and "without leave," of the excepted words not guilty, of the substituted words guilty.

Of the charge, not guilty but guilty of violation of the sixty-first article of war.

Note.—For a discussion of the incidental power of appointing and confirming authorities to approve and confirm a finding of guilty of a lesser included offense see Chapter XVI, paragraphs 377 and 379.

299. Guilty with Exceptions and Substitutions.—It is a peculiarity of the finding at military law that a court-

martial, where of opinion that any portion of the allegations in a specification is not proved, is authorized to find the accused guilty of a part of a specification only, excepting the remainder; or, in finding him guilty of the whole (or any part), to substitute correct words or allegations in the place of such as are shown by the evidence to be incorrect. And provided the exceptions or substitutions leave the specification still appropriate to the charge and legally sufficient thereunder, the court may then properly find the accused guilty of the charge in the usual manner. Familiar instances of the exercise of the authority to except and substitute in a finding of guilty occur in cases where, in the specification, the name or rank of the accused or some other person is erroneously designated, or there is an erroneous averment of time or place, or a mistaken date, or an incorrect statement as to amount, quantity, quality, or other particular, of funds or other property. But the authority to find guilty of a lesser included offense, or otherwise to make exceptions and substitutions in the findings, does not justify the conviction of the accused of an offense entirely separate and distinct in its nature from that charged, thus "selling" and "through neglect losing" property are separate offenses though each is a violation of A. W. 84.

300. **Finding of Guilty of Lesser Included Offense.—Substitution of the General Article or Other Special Article.**—The specification apprises the accused of the allegations against him. He is therefore put on trial as to all the allegations in the specification. If but a part of such allegations be proved he may be found guilty of such part, provided it constitutes an offense at military law. Thus, on a specification alleging desertion for a certain period, where the evidence proves an absence without leave for all or a part of such period, but does not prove desertion or an attempt to desert, the court may find the accused guilty of absence without leave for such period or part thereof as may be proved. Likewise, where a specification of misbehavior before the enemy under the seventy-fifth article alleges that the accused was absent without authority from his organization or post of duty for a certain period and the evidence proves that he was so absent but does not prove the other elements necessary to constitute the

misbehavior denounced in the seventy-fifth article of war, the accused may be found guilty of absence without leave for the period charged and proved. And on the same principle manslaughter or assault and battery may be found on trial for murder (Par. 377). Indeed, in any case where such parts of the specification as are proved constitute an offense denounced in a special article of war, or a disorder or neglect to the prejudice of good order and military discipline as denounced in the general (ninety-sixth) article of war or a crime or offense punishable under that article, a finding of guilt may be made under the appropriate article. An attempt to commit a crime, since it is an element of the crime, may be found on a specification alleging such crime.

NOTE 1.—"The prisoner may be convicted not merely of the offense with which he is charged, but of any lesser offense that can be carved out of the indictment." (May's Crim. Law, 93.)

NOTE 2.—Where the article of war does not include "attempt" in its express terms, the attempt should be found as a violation of the general article.

301. JOINT CHARGES.—Where joint charges are tried, if one or more of the accused persons is acquitted and one or more is convicted, the findings should by proper exceptions eliminate the words showing that the acquitted person or persons was a joint participant in the offense, and should expressly acquit those persons whom it finds not guilty.

302. REASONS FOR FINDINGS.—A court-martial may spread upon the record of trial a brief statement of reasons upon which its findings are based. In many cases such a statement will aid the reviewing authority in determining the action to be taken by him.

303. FINDINGS WHERE NO CRIMINALITY IS INVOLVED.—A finding of "guilty without criminality" is not consistent and should not be made. If the accused is found to have committed the act and done the things alleged in the specification, but without the guilty intent or knowledge essential to constitute the offense, the court should, as to the specification, find the accused "not guilty."

304. FINDINGS UNDER CHARGE OF DRUNKENNESS.—A person "under the influence of intoxicating liquor" or "intoxi-

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cated" is "drunk." Therefore, under the eighty-fifth article of war, in charging that the accused was found "drunk" the word "drunk" will be used. So, in charging other offenses involving drunkenness, no other word or phrase will be used as a substitute for "drunk." Under such charges the court should not in its findings substitute such phrases as "under the influence of intoxicating liquor" and "intoxicated" for "drunk."

305. Recording of Finding or Sentence by Reporter.—A court-martial, member of court, or trial judge advocate can not, of course, lawfully communicate to a reporter or clerk, by allowing him to record the same or otherwise, the finding or sentence of the court unless the sentence or acquittal has been announced in open court. But the fact that the finding or sentence or both may have been made known to a reporter or clerk can not affect the legality of the proceedings or sentence. (Digest, p. 558, XIV, E, 7, g.)

Section III.

PREVIOUS CONVICTIONS.

306. Procedure as to Previous Convictions.—Courts-martial will, after a finding of guilty, be opened for the purpose of ascertaining whether evidence of previous convictions has been referred to the court by the appointing authority, and, if so, of receiving it. The introduction and use of evidence of previous convictions in the case of officers, warrant officers, members of the Army Nurse Corps, Army field clerks, and field clerks Quartermaster Corps, will be limited to that pertaining to convictions by court-martial of an offense or offenses committed by the accused during his status as such officer, warrant officer, member of the Army Nurse corps, Army field clerk, or field clerk Quartermaster Corps, and within three years next preceding the commission of any of the offenses of which he stands convicted before the court. In the case of soldiers it will be limited to that pertaining to convictions by courts-martial of an offense or offenses committed by the accused during the current enlistment and within one year next preceding the commission of any of the offenses of which he stands convicted before the court. These convictions may be

proved only by the records of previous trials and convictions or by duly authenticated copies of such records, or by duly authenticated copies of orders promulgating such trials and convictions. Copies of such records or orders promulgating trials and convictions are duly authenticated when impressed with the stamp of the bureau, office, or headquarters having custody of the original, or when certified as a true copy by an officer having custody of such records.

An entry of a fact of a previous conviction in the service record of the accused is prima facie evidence, a duly authenticated copy of which may be accepted; unless the accused denies the correctness of the entry, or objects to it as not fairly representing the nature of the previous conviction. On such denial, or objection, the court may, in its discretion, suspend proceedings until a duly authenticated copy of the court-martial order or trial record is obtained; otherwise it will not consider the entry in the service record whose correctness is denied, or whose fairness is objected to by the accused. The record of previous convictions, as shown by the service record, is duly authenticated when certified as a true copy by the officer having custody of such service record.

In a trial by general court-martial, when the proof is the copy of the record or of the order promulgating the sentence furnished to the regimental or other commander, it will be returned to him, and a certified copy will be attached to the record of trial. When the proof is a copy of the entries of previous convictions in the service record, such copy will be attached to the record of trial. The evidence of previous convictions referred to a special or summary court will, after trial, be returned to the appointing authority and will, after action by the latter on the case, be returned to the command to which it pertains.

307. Character of Previous Convictions.—By "previous conviction" is meant a previous conviction by a court-martial where the sentence has been approved, and confirmed if confirmation be necessary, and ordered executed by competent authority, or which has received such final approval or confirmation (after examination by the Board of Review and the Judge Advocate General in cases where so required by A. W. 50½) as may be necessary to its execution. Such previous conviction may be ad-

mitted even where the whole sentence was remitted. A previous conviction by a civil or naval court, an acquittal, or an approved conviction by a court-martial that has been set aside as illegal, is not a "previous conviction" as the phrase is used here. Previous convictions are not limited to those for offenses similar to the one for which the accused is on trial. The object is to see if the accused is an old offender and therefore less entitled to leniency than if on trial for his first offense. This information might not be fully obtained if evidence of previous convictions of similar offenses only were laid before the court. The consideration of previous convictions has no bearing upon the question of guilt of the particular charge on trial, but only upon the amount and kind of punishment to be awarded. They are not considered until after the findings have been reached.

Section IV.

SENTENCES.

308. Voting on Sentences.—After the findings have been determined upon and resulted in conviction upon the charge, or some one at least of the charges when there are several, or in a conviction of a lesser offense included in one charge, and evidence of previous convictions, if any, has been introduced, the court proceeds to adjudge the sentence. In voting, the thirty-first article of war requires that the voting shall be by secret written ballot, and that the junior member of the court shall in each case count the votes, which count shall be checked by the president, who will forthwith announce the result of the ballot to the members of the court. The balloting will be (except as in this paragraph otherwise directed) in the same manner prescribed for voting upon findings in paragraph 294, supra. Before the voting begins, any member desiring to propose a sentence will write it on a slip of paper without signature and hand it to the president. The president, before the voting begins, will read the proposed sentences to the court and the members will vote on them in order, beginning with the lightest, until a sentence has been agreed upon by the number of members required by the forty-third article of war.

A. W. 43 requires:

(a) For a death sentence, the concurrence of all the members of the court-martial present at the time the vote is taken (and for an offense expressly made punishable by death by the Articles of War);

(b) For a sentence to life imprisonment or to confinement for more than 10 years, the concurrence of three-fourths of all the members of the court-martial present at the time the vote is taken;

(c) For all other sentences, whether by general or special court-martial, the concurrence of a two-thirds vote of those members present at the time the vote is taken.

When a sentence of death is proposed all of the members present at the time the vote is taken must agree upon the death sentence before it can be adopted, regardless of whether the death penalty is mandatory or merely discretionary in the case on trial. Even in a case where the punishment is fixed, as for instance, under the eighty-second article, where the punishment for lurking or acting as a spy is death, and under the ninety-fifth article, where the punishment is dismissal, the members must by vote impose this punishment. All the members of the court present at the time the vote is taken—those, if any, who voted for an acquittal equally with those who voted for conviction—will vote for some sentence.

A proposed sentence which does not receive the number of ballots requisite for its adoption is rejected, and a ballot will then be taken upon the next heavier proposed sentence, and so on until a sentence has been adopted or until each proposed sentence has been balloted upon. If, after all the proposed sentences suggested in the first instance have been voted upon, none has received the number of ballots requisite for its adoption, then each member will make a new proposal of a sentence, in the same manner as in the first instance, and these new proposals will be balloted upon in the same order and manner as before. This procedure will be continued until some sentence is legally adopted. The written ballot on each proposed sentence will be without signature and may be expressed "For" or "Against." The ballots will be destroyed as soon as the

result of the ballot is announced, unless some member of the court desires first to verify the count, when they will be destroyed immediately after such verification.

NOTE 1.—In determining whether a two-thirds or three-fourths vote, as the case may require, has been cast in favor of any sentence, wherever the mathematical two-thirds or three-fourths, as the case may be, of the number of members present, includes a fraction, one vote will be required to represent such fraction. Thus, for example, since two-thirds of eight is five and one-third, in case eight members are present, five votes not constituting the full statutory two-thirds required, the ballots of six members will be required to agree upon a sentence. Similarly, in a court where seven members are present, a sentence requiring a three-fourths vote will require the votes of six members.

NOTE 2.—If a question arises as to which of two or more proposed sentences is the lightest, the president will determine the question (with the benefit of the advice of the law member of the court, if present) and will direct the order in which the proposed sentences shall be balloted upon.

309. MANDATORY AND DISCRETIONARY PUNISHMENTS.—Punishment, under the Articles of War, is either mandatory—that is, a certain punishment is prescribed by the terms of the article—or is discretionary—that is, it is left to the discretion of the court-martial. If the punishment is prescribed in the article violated, any other punishment than that prescribed is illegal. For instance, the punishment imposed by a court for a violation of the ninety-fifth article of war must be dismissal; it can not be less and it can not be more, though a conviction under other articles at the same trial might authorize the inclusion of other forms of punishment in the sentence. Before pronouncing sentence the court should, therefore, examine the article violated to see what punishment may be legally awarded. As to discretionary punishments, the President, by virtue of an act of Congress, has by Executive order prescribed maximum limits of punishment for certain offenses. The latest order is found in Chapter XIII, paragraph 349. If the punishment is discretionary the court, before proceeding to award a punishment, will ascertain whether a limit is fixed in the order, and if no limit is fixed the court may impose any punishment that is sanctioned by the custom of the service, except that, in time of peace, the period of confinement in a

penitentiary must in no case exceed the maximum period prescribed by the law which, under A. W. 42, permits confinement in a penitentiary, unless, in addition to the offense so punishable under such law, the accused shall have been convicted at the same time of one or more other offenses. (A. W. 45.)

NOTE 1.—See mandatory and discretionary punishment, Chapter IV, Section II, paragraph 40.

NOTE 2.—If a general court-martial, after finding an accused guilty of an offense for which a mandatory punishment such as death, dismissal, or dishonorable discharge is prescribed by the Articles of War, shall find upon a ballot being taken upon the question of imposition of such mandatory sentence that the number of votes required by A. W. 43 for the imposition of such sentence have not been cast in its favor, then a second ballot shall be taken upon the same question. If upon such second ballot the requisite number of votes for imposition of such sentence is still lacking, the court will reconsider its findings in the case, and may revoke its former findings and find the accused not guilty, or guilty of a lesser included offense.

NOTE 3.—The fact that but one or two punishments are mentioned as the maximum for a specified offense in the maximum punishment order does not preclude awarding a lesser punishment of a different kind. The maximum punishment order is not to be treated as a statement of the punishments to be awarded for specified offenses, but only as a limitation upon the extreme penalty.

310. SENTENCES FOR OFFICERS.—For officers the legal sentences by court-martial, depending on the nature of the offense and the jurisdiction and punishing power of the court, include death; dismissal with confinement at hard labor; dismissal; loss of rank or files; suspension from rank, command, or duty, with or without loss or detention of pay or part of pay; fine; forfeiture of pay or part of pay; detention of pay or part of pay; restriction to limits; reprimand; and admonition; but if tried by special court-martial the limitations upon the punishing power of the court set out in A. W. 13 will be observed. (A. W. 12, 13.)

NOTE.—Immediately upon the promulgation of any sentence of court-martial in the case of a commissioned officer involving suspension from rank and command, confinement, reduction in lineal rank, or any other material change in the officer's status, the commander who has authority to approve such sentence and carry it into execution will advise The Adjutant General of the Army, by telegraph, of the sentence imposed as approved or mitigated and the date of promulgation thereof. (G. O. No. 6, War Dept., 1910.)

310a. Sentences for Members of Army Nurse Corps, Warrant Officers, Army Field Clerks, and Field Clerks Quartermaster Corps.—Members of the Army Nurse Corps have relative rank (act of June 4, 1920, 41 Stat. 767–768), and are officers of the Army, although not commissioned officers. Warrant officers, Army field clerks, and field clerks Quartermaster Corps are likewise officers, although not commissioned officers. Therefore the punishments prescribed in paragraph 310, supra, as appropriate for commissioned officers are those appropriate for these classes of persons subject to military law. Being officers of the Army and no part of the enlisted personnel, they can not be reduced to the ranks, nor to the grade or status of a noncommissioned officer. A dismissal from the service, however, does not require confirmation under A. W. 48.

311. Sentences for Soldiers.—For soldiers, the legal sentences, depending on the nature of the offense and the jurisdiction of the court, include death; dishonorable discharge; confinement at hard labor; hard labor without confinement, with or without restrictions to limits; restrictions to limits of command, post, camp, or reservation; forfeiture of pay, or of part of pay; detention of pay, or of part of pay; and reprimand; for enlisted men of the sixth or of any higher grade, reduction to the seventh grade; for specialists, loss of specialist rating, with or without reduction to the seventh grade; and for those holding a certificate of eligibility to promotion, deprivation of all rights and privileges arising from such certificate. That portion of pay which is required to be allotted to dependent relatives of class A, under the provisions of Article II of the War Risk Insurance Act of October 6, 1917, as amended by the act of December 24, 1919 (41 Stat. 372), is not subject to be detained or forfeited by sentence of court-martial. Similarly the Comptroller of the Treasury has held (*a*) that portion of pay voluntarily allotted for the support of dependent relatives of class B under said War Risk Insurance Act; (*b*)

that portion of pay allotted for the payment of insurance premiums under said act; and (*c*) that portion allotted for the purchase of liberty loan bonds are not disturbed or affected by a sentence of court-martial imposing a forfeiture of pay (24 Comp. Dec. 621), and such allotments will be excluded from the effect of any sentence of detention or forfeiture of pay or part of pay. A sentence imposing detention or forfeiture of a part of pay means the detention or forfeiture of the specified part of that portion of the pay which is not so allotted.

NOTE 1.—Confinement without hard labor should never be imposed.

NOTE 2.—For forms of sentence see Appendix 13.

NOTE 3.—For limitations on punishing powers of special and summary courts-martial, see A. W. 13 and 14, and paragraphs 42 and 44, supra, and Appendix 21.

NOTE 4.—For War Department policy respecting punishments, see infra, paragraphs 340–345.

NOTE 5.—As to punishments generally, see infra, Chapter XIII, paragraphs 333–349.

312. DISMISSAL.—Under the ninety-fifth article of war which prescribes the mandatory sentence of dismissal upon conviction "of conduct unbecoming an officer and a gentleman," no punishment in addition to dismissal is authorized. Therefore no punishment in addition to dismissal can legally be imposed upon conviction of an offense under the ninety-fifty article of war alone.

NOTE.—For statement by whom a sentence of dismissal or dishonorable discharge imposed by National Guard courts-martial, not in the service of the United States, must be approved, see section 107, act of June 3, 1916, 39 Stat., 166; Appendix 2, infra.

313. LOSS OF RANK OR FILES.—Loss of rank or files is accomplished by a sentence directing that an accused be placed at the foot of the list of officers of his grade on the promotion list of the Army, or of his department, branch, or service, if he belongs to a department, branch, or service, not carried on the general promotion list of the Army, or that he remain at the foot of such list for his grade until he shall have lost a certain number of files, or for a certain length of time, or that he lose a certain number of files, or that his name shall appear in the lineal list of officers of his grade on the general promo-

tion list of the Army, or on the promotion list of his department, branch, or service, as the case may be, below that of a certain officer named.

314. SUSPENSION FROM RANK.—Suspension from rank includes suspension from command. It deprives an officer of the right to promotion to a vacancy in a higher grade occurring pending the term of suspension and which he would have been entitled to receive by virtue of seniority had he not been suspended. It does not, however, deprive the officer of the right to rise in files in his grade. Suspension from rank also makes an officer ineligible to sit upon a court-martial, court of inquiry, or military board, and deprives him of privileges that depend on rank, such as the selection of quarters.

315. SUSPENSION FROM COMMAND.—This punishment merely deprives the officer of authority to exercise his proper military command, and consequently of his right to give orders to or exact obedience from his juniors or perform any other duties that go with the exercise of command. It does not affect his right of promotion or any military rights or privileges other than those attaching to command. It is therefore not an appropriate punishment for a staff officer.

316. SUSPENSION FROM DUTY.—Suspension from duty is practically equivalent to a sentence of suspension from command. It is appropriate in the case of an officer holding a position involving the performance of administrative duty, as distinguished from actual military command, as in the case of officers of the staff.

317. FINE.—A fine is distinguished from a forfeiture in that it is a punishment which imposes a pecuniary liability in general, not necessarily affecting pay. It is especially recognized as a form of punishment in the ninety-fourth article of war. It is usually accompanied in the sentence by a provision, in order to enforce collection, that the person fined shall be imprisoned until the fine is paid or until a fixed portion of time considered as an equivalent punishment has expired. Fines as well as forfeitures accrue to the United States and can not be imposed or collected for the benefit of any individual.

318. REPRIMAND.—This sentence is usually awarded to officers for minor offenses where a mild penalty is to be inflicted. It may be awarded to any other person subject to military law under appropriate circumstances where other penalties are not necessary. A summary court-martial may impose this punishment where it is believed it will be more effective than a forfeiture or other punishment. The proper authority to administer the reprimand is the reviewing authority, and he may administer it orally or in writing, varying it in severity or mildness according to his views in the case.

319. RESTRICTION TO LIMITS.—This form of punishment is rather a deprivation of privileges than confinement. It will usually be so qualified as to enable the person upon whom it is imposed to perform his military duties.

320. DISHONORABLE DISCHARGE.—A dishonorable discharge can be imposed only pursuant to a sentence of a general court-martial. (A. W. 108.) The discharge should be dated as of the day on which the order promulgating such approval is received at the post where the soldier is held. A sentence adjudging a dishonorable discharge to take effect at such period during a term of confinement as may be designated by the reviewing authority is illegal.

321. SUSPENSION OF DISHONORABLE DISCHARGE.—Members of a court-martial may properly recommend, in a communication made separately but forwarded to the reviewing authority with the record, that sentence of dishonorable discharge be suspended. (See par. 332.)

322. CONFINEMENT AT HARD LABOR.—In the case of officers this punishment is imposed only in connection with a sentence of dismissal. Where "hard labor" is intended, it should be stated in the sentence, but the omission of these words will not prevent such punishment being required where it is authorized in the maximum-punishment order. (See A. W. 37.)

NOTE.—Chapter XVI, Section I, paragraphs 396–398, state the rules as to whether a post, the United States Disciplinary Barracks or one of its branches, or a penitentiary shall be designated as the place of confinement.

323. Hard Labor Without Confinement.—This punishment is regulated by the provisions of the Executive order fixing the maximum limits of punishment, Chapter XIII, Section VI, paragraph 349.

It is the policy of the War Department to encourage the use of this punishment, wherever practicable, in lieu of confinement at the post or in a guardhouse.

324. Forfeiture of Pay and Allowances.—Pay and allowances can not be forfeited in a sentence by implication. If the court intends to forfeit pay or pay and allowances, the penalty of forfeiture will be adjudged in express terms in the sentence. No other punishment imposable by court-martial—not even a sentence of death, dismissal, suspension, dishonorable discharge, or imprisonment—involves of itself a forfeiture or deprivation of any part of the pay or allowances due to the party at the time of the approval or taking effect of the sentence. It is not customary to provide in sentences for a forfeiture of allowances unless the sentence also imposes forfeiture of pay. **A sentence of forfeiture of pay, without mention of allowances, does not forfeit allowances,** and a sentence of forfeiture of a certain number of days' pay, or two-thirds of a soldier's pay for a certain period, does not forfeit extra-duty pay. (Digest, p. 544, XII, B, 3, e (1); Bul. 18, War Dept., 1915, pp. 8, 9.)

325. Courts Can Not Stop Pay in Favor of Government or an Individual.—A court-martial can direct a forfeiture only in favor of the United States, and can not assign the pay of a soldier to any other person; nor can a soldier be required to receipt for money paid without his consent. A sentence can not appropriate or stop pay for the reimbursement or benefit of the Government or a Government agency, such as a company fund, post fund, hospital fund, nor of an individual, civil or military, however justly the same may be due him, either for money borrowed, stolen, or embezzled by the accused or to satisfy any other pecuniary liability of the accused, whether in the nature of debt or damages. The "stoppage" of pay to reimburse the Government or a Government agency on account of losses for which officers and enlisted men are responsible is purely an administra-

tive matter with which courts-martial have nothing to do. Sentences providing that a soldier shall be dishonorably discharged, forfeiting all pay and allowances due or to become due, "except such amounts as may be due the post exchange, Fort ———, and the company fund, Company ———, ——— Infantry," in no way hasten or facilitate the settlement of the debts due the exchange or company fund. Such matters in a sentence are mere surplusage.

326. Forfeiture of Deposits.—Deposits of soldiers and interest thereon are forfeited by desertion, but the forfeiture can not be imposed by sentence of a court-martial. They are exempt from liability to meet a sentence of a court-martial imposing forfeiture of pay or allowances. A sentence that a soldier shall deposit a certain part of his pay is illegal. (Digest, p. 547, XII, B, 4, c.)

327. Reduction of Noncommissioned Officer.—This punishment is regulated by the provisions of the Executive order fixing maximum limits of punishment, Chapter XIII, Section VI, paragraph 349, **and by General Orders No. 71, War Department, December 1, 1920 (Appendix 21).**

328. Detention of Pay **or of Part of Pay.**—This punishment was revived by the Executive order of September 5, 1914, fixing the maximum limits of punishment, **and is recognized now by statute (A. W. 14),** and is regulated by **A. W. 14** and the provisions of the Executive order contained in Chapter XIII, Section VI, paragraph 349, infra.

It is the policy of the War Department to encourage the use of this punishment, where applicable, instead of forfeiture of pay.

329. When Reward for Apprehending Deserter Not to be Stopped.—If a soldier be brought to trial under a charge of desertion and acquitted, or convicted of absence without leave only, any amount paid as a reward for his arrest will not be stopped against his pay, and a sentence providing for such a stoppage is not authorized.

330. Sentences of General Prisoners.—Courts-martial in imposing sentences upon general prisoners are restricted to imposing additional confinement at hard labor to be served upon the completion or termination of their existing

sentences, and will not interfere with the manner of executing such sentences by prescribing loss of good-conduct time, solitary confinement, or confinement on bread-and-water diet, leaving all such punishments to be imposed by the commanding officer as the ordinary means of enforcing discipline.

331. Reasons for Sentence.—A court-martial may spread upon the record of trial a brief statement of reasons upon which its sentence is based. In many cases such a statement will aid the reviewing authority in determining the action to be taken by him.

332. Recommendations to Clemency.—When a court-martial, or any member thereof, desires to submit a recommendation to clemency, including a recommendation for the suspension of the whole or of any part of the sentence imposed by the court, such recommendation will be signed by each member of the court desiring to participate therein. The communication carrying the recommendation will include a statement in succinct form of the reasons upon which the recommendation is based, and of the specific amount and character of clemency recommended, and will be appended to the record of trial. (See par. 357 (*d*).)

NOTE.—It is extremely annoying to a reviewing authority to receive a vague, indefinite recommendation to clemency. Both he and his staff judge advocate, in advising him, desire, and should have, the benefit of the specific opinion and recommendations of the members of the court recommending clemency as to the amount and character of the clemency which should be extended.

332a. Announcement of Sentence or Acquittal in Open Court.—Whenever the court has acquitted the accused upon all specifications and charges, the court shall at once announce such result in open court. (A. W. 29.)

Whenever a general or special court-martial has sentenced the accused, the court shall at once announce the findings and sentence in open court, unless, in the court's opinion, for reasons that will be stated in the record, the findings and sentence should not be made public at that time.

Immediately upon the announcement of the sentence or acquittal (or in case the court directs, as above, that the sentence be not announced in open court, immediately thereupon) the

trial judge advocate will notify the commanding officer in writing, direct, whereupon, if the accused has been acquitted, or if he has been convicted and the sentence does not include confinement, the commanding officer will at once, if the accused is in arrest or confinement, release him from such arrest or confinement, unless he is awaiting trial or the action of the reviewing or confirming authority upon conviction under other charges, on account of which the commanding officer deems it necessary to continue him in such arrest or confinement. No person subject to military law convicted by a general or special court-martial shall be ordered to duty outside of the jurisdiction of the reviewing authority until the case has been finally disposed of, except by the authority of the Secretary of War.

CHAPTER XIII.

COURTS-MARTIAL—PUNISHMENTS.

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Section I.

DISCIPLINARY POWER OF COMMANDING OFFICER.

333. Authority for.—While courts-martial are the judicial machinery provided by law for the trial of military offenses, the law also recognizes that the legal power of com-

mand, when wisely and justly exercised to that end, is a powerful agency for the maintenance of discipline. Courts-martial and the disciplinary powers of commanding officers have their respective fields in which they most effectually function. The tendency, however, is to resort unnecessarily to courts-martial. To invoke court-martial jurisdiction rather than to exercise this power of command in matters to which it is peculiarly applicable and effective, is to choose the wrong instrument, disturb unnecessarily military functions, injure rather than maintain discipline, and fail to exercise an authority the use of which develops and increases the capacity for command.

Legal sanction is now given to the exercise of such disciplinary power by the following article of war:

"ART. 104. Under such regulations as the President may prescribe, the commanding officer of any detachment, company, or higher command may, for minor offenses, impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial."

The disciplinary punishments authorized by this article may include admonition, reprimand, withholding of privileges for not exceeding one week, extra fatigue for not exceeding one week, and restriction to certain specified limits for not exceeding one week, and hard labor without confinement for not exceeding one week, but shall not include forfeiture of pay or confinement under guard; except that in time of war or grave public emergency a commanding officer of the grade of brigadier general or of higher grade may, under the provisions of this article, also impose upon an officer of his command below the grade of major a forfeiture of not more than one-half of such officer's monthly pay for one month.

A person punished under authority of this article who deems his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate

or remit any unexecuted portion of the punishment. The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a crime or offense growing out of the same act or omission; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty. (But see par. 152(a) supra.

While commanding officers should always use their utmost influence to prevent breaches of discipline and compose conditions likely to give rise to such breaches, they should also impose and enforce the disciplinary punishment authorized by the above article. This authority, involving the power, judgment, and discretion of the commander, can not be delegated to or in any manner participated in by others, but must be exercised by the commander upon his own judgment and in strict compliance with the article and the regulations prescribed by the President pursuant thereto. Accordingly, the commanding officer of a detachment, company, or higher command will usually dispose of, and may award disciplinary punishment for, any offense committed by any enlisted man of his command which would ordinarily be disposed of by summary court-martial, when the accused does not demand trial by court-martial before the commanding officer has made and announced his decision in the case.

As remarked by the major general commanding in G. O. 73, W. D., 1892:

"The increasing number of trials by summary court and the trivial character of many of the offences tried indicate that commanding officers frequently fail to make use of this power. They are therefore reminded that it is their duty to use all reasonable means to prevent the occurrence of delinquencies rather than to punish them. In the discharge of this duty they may not only deprive unworthy soldiers of privileges but take such steps as may be necessary to enforce their orders. It is believed that the proper use of this power will make it unnecessary to bring before the summary court many of the trifling delinquencies which are now made the subject of trial; indeed, that such

trifling delinquencies will in great measure be prevented. Department commanders will see that their subordinate commanding officers fulfill their duties in this regard."

334. Record of Punishment.—For each punishment awarded the commander will cause to be made in the company punishment book a brief statement showing—

(*a*) The offense, including date.

(*b*) Punishment, if any, with date on which awarded.

(*c*) Decision of higher authority, if appeal is made; but will not make any entry thereof on the service record of the accused.

335. Appeals.—If an appeal is made to the next superior authority, it shall be in writing through the immediate commander awarding the punishment or his successor, who will immediately forward it to the superior with a copy of the record. An appeal shall consist of a brief statement signed by the accused, giving his reasons for regarding the punishment as unjust or disproportionate, and shall be accompanied by a like brief statement by the commander in support of the punishment awarded. The superior will, in passing upon the appeal, hear no witnesses and will consider no statements other than those forwarded with the appeal, but will be limited strictly to the consideration of the punishment awarded. When justice requires such action he will modify the punishment or set it aside, but will not increase it, and will in no case award a different kind of punishment. After having considered the appeal he will return the record to the commanding officer from whom received, with a statement of his disposition of the case.

336. Not Limited to Soldiers.—The power is not limited in its application, either in law or principle, to enlisted men, but may with propriety be applied as well to any other person subject to military law, including commissioned officers, especially those of junior grades. Obviously, in the case of officers the occasion for such action will be less frequent, the variety of punishment available more restricted, and the selection of the most effectual punishment more perplexing, but when the best interests of discipline require such action will be taken with firmness, and in no wise restrained

by an unwarranted regard for the commissioned grade of the offender.

336a. War Department Policy—Disciplinary Punishment Preferred to Court-Martial.—It is the policy of the War Department that commanding officers should resort to their disciplinary powers under A. W. 104 in preference to employing courts-martial, and more especially summary courts-martial. In accordance with this policy trials by court-martial, and particularly by summary courts-martial, will usually be resorted to only where disciplinary punishments have failed to prevent infractions of discipline, and in consequence the instances of disciplinary punishment should far exceed the number of trials. It should be a very rare case where a soldier is tried by summary courts-martial without having previously been repeatedly subjected to disciplinary punishment.

This policy does not leave it optional with the commanding officer of the detachment, company, or higher command to either impose disciplinary punishment or prefer charges in his discretion. On the contrary, it requires him to resort first to disciplinary punishment. Inability to maintain discipline without frequent resort to court-martial, and particularly to trials by summary courts-martial, strongly suggests inefficiency, unless the circumstances be very exceptional. As it is the duty of a senior commanding officer to see that subordinate commanders follow this policy, he must accept the ultimate responsibility for the number of inferior court trials in the commands of his subordinate commanding officers. No commanding officer exercising court-martial jurisdiction can escape responsibility for an excessive number of such trials by the excuse that organization commanders have represented that trials are necessary to maintain discipline. Discipline must be maintained subject to this War Department policy, which commanding officers will rigidly enforce.

336b. As to Officers, in Time of War or Emergency.—It is notable that in time of war or great public emergency the power of punishment by a commanding officer of the grade of brigadier general or of higher grade extends (under the one hundred and fourth article of war, as amended by the code of 1920), as to officers of his command below the grade of major, to

forfeiture of not more than one-half of such officer's monthly pay for one month.

336c. Procedure.—It is not necessary that formal charges be filed. But the accused will be informed orally or in writing of the accusation, and, where he does not admit the commission of the offense, the commanding officer will carefully investigate the case in the same manner as a summary court-martial, administering oaths to all persons testifying for the prosecution or defense. (But see par. 76a.) The investigation will in all ordinary cases be held at the office of the commanding officer.

336d. In Case Accused Demands Trial.—If the accused demands trial by court-martial, then (a) if charges have been filed steps will promptly be taken to investigate the charges in the usual manner, or (b) if charges have not been filed the commanding officer may himself prefer charges or may direct an investigation to be made to determine whether charges should be preferred, and, in either case, if formal charges are preferred they will be investigated in the usual manner. No notation or memorandum of any kind of accused's demand for trial by court-martial will appear upon the charges.

Section II.

CONFINEMENT IN A PENITENTIARY.

337. When Authorized.—The forty-second article of war follows the rules of the Federal Penal Code and practice respecting the imposition of penitentiary confinement in so far as they can be applied to court-martial procedure. Under the Federal Penal Code any offense is a felony which is punishable under the code or other statute of the United States by death, or by imprisonment for a term exceeding one year. (Sec. 335, Fed. Pen. Code of 1910.) But no person may be confined in a penitentiary unless the punishment actually adjudged for an offense of which he has been convicted exceeds one year. Under civil procedure it is not permissible to join in a single indictment and trial offenses of a different nature. As a matter of practice, also, confinement is never ordered to be executed in a penitentiary unless among the offenses upon which the sentence is awarded is found a felony; that is to say, an offense of a civil nature, separately

punishable by confinement to exceed one year. The practical result is that no person is confined in a penitentiary unless both of the following conditions subsist:

(1) The confinement that could lawfully be awarded as punishment of some one of the offenses of which he stands convicted (if that conviction stood alone) would exceed one year.

(2) The confinement actually adjudged exceeds one year.

The ninety-third and ninety-sixth articles of war now confer upon courts-martial jurisdiction to try all crimes and offenses, not capital, of which persons subject to military law may be guilty. Under the military practice, dissimilar offenses may be joined in the same set of charges; convictions may be had on one set of charges joining crimes of a civil nature with purely military offenses, and a single sentence may be adjudged on all the convictions. Also, there are certain purely military offenses which are by statute made punishable by confinement in a penitentiary, regardless of the term of confinement imposed. Notwithstanding these departures from the practice of Federal courts, the jurisdiction granted to courts-martial to punish offenses of a civil nature is not to be exercised with greater harshness than is practiced under the criminal jurisdiction of United States courts, and the analogies with the penal rules of those courts are maintained, as far as they can be preserved under court-martial procedure, by the forty-second article of war and the following rules of practice, which result from that article.

338. Classes of Sentences to be Executed in a Penitentiary.—Sentences of the following classes may be executed in a penitentiary:

Class 1—Commutation of death sentence.—Any confinement, whether more or less than a year, awarded by way of commutation of a death sentence, may be executed in a penitentiary; and this is true whether the offense for which the sentence of death was awarded was of a military or of a civil nature, and whether the sentence was awarded on conviction of a capital charge alone or on conviction on a capital charge coupled with conviction on other charges not capital.

Class 2—Military offenses.—A sentence of confinement awarded upon conviction of one or more of the military offenses enumerated in this class may be executed in a penitentiary, regardless of the length of the sentence imposed, but in practice a penitentiary should not be designated unless the confinement adjudged exceeds one year. However, if a conviction is had on several offenses, either military or civil in nature, one of which is included in this class, and the sentence adjudged on all the convictions together exceeds one year, the confinement may be executed in a penitentiary. The military offenses comprised in this class are:

(*a*) Desertion in time of war.

(*b*) Repeated desertion in time of peace.

(*c*) Mutiny.

Class 3—Offenses of a civil nature.—A sentence exceeding one year's confinement, awarded, either on conviction of any one or more of the several offenses of a civil nature described below, or on conviction of any one or more of such civil offenses coupled with a conviction or convictions of one or more military offenses, may be executed in a penitentiary, if any one of such several offenses of a civil nature standing alone would be punishable by penitentiary confinement for more than one year, by some statute of the United States, of general application within the continental United States (excepting section 289, Penal Code of the United States, 1910), or by the law of the District of Columbia.

The civil offenses contemplated in class 3 are:

(*a*) An act or omission specified and denounced as an offense in the Penal Code of the United States (Federal Penal Code of 1910, except section 289 thereof), and made punishable thereby by confinement in a penitentiary for more than one year.

(*b*) An act or omission specified and denounced as an offense in any other statute of the United States, of general application within the continental United States (always excepting, however, section 289 of the Federal Penal Code), and made punishable thereby by confinement in a penitentiary for more than one year. This heading has reference particularly to penal provisions not properly

separable from the administrative laws of the several branches and departments of Government, and not included in the Penal Code. Such offenses will rarely be encountered in court-martial practice.

(*c*) An act or omission recognized as an offense by the law of the District of Columbia, wherever committed or omitted, and made punishable thereby by confinement in a penitentiary for more than one year.

By the phrase "the law of the District of Columbia" is meant the entire body of law, both statutory and common law, in force in the District of Columbia on the date of the commission of the offense.

Offenses under this head that may be encountered in court-martial practice include the offense of sodomy.

339. AUTHORITY FOR PENITENTIARY SENTENCE TO BE CITED.—In each case tried by general court-martial in which a penitentiary is designated as the place of confinement of the person tried, the record of trial, when forwarded to the Judge Advocate General of the Army, will be accompanied by a signed statement indicating the law or laws authorizing the confinement in a penitentiary of the person sentenced.

If the law relied upon as authorizing confinement in a penitentiary be a Federal statute, an accurate citation will be regarded as sufficient to indicate the law, but if any other law is relied upon as authorizing such confinement, the law will be quoted in full in the required statement.

SECTION III.

WAR DEPARTMENT POLICY REGARDING PUNISHMENTS.

340. DESERTION.—The policy of the War Department respecting punishment for desertion was announced in General Orders, No. 77, War Department, June 10, 1911. Corrective confinement and forfeiture were suggested in cases of inexperienced soldiers who by surrender manifested a disposition to atone for their offenses. The number so punished and saved to the service has so increased each year that this policy has been enforced with fairly satisfactory results. In addition a limited number of this class of of-

fenders has been restored to duty without trial under the provisions of A. R. 131.

Since that order was issued important changes have been introduced in our military penology. Purely military offenders serving sentences in the United States Disciplinary Barracks at Fort Leavenworth and its branches may be restored to an honorable status and complete their enlistment. By the act of August 22, 1912 (37 Stat. 356), reenlistment of this class of offenders is authorized with the approval, in each case, of the Secretary of War. Under the provisions of the act of April 27, 1914 (38 Stat. 354), dishonorable discharge may be suspended with a view to restoration to duty by remission thereof should the conduct of the offender warrant. There are now additional means of saving men to the colors—men whose offenses are thoughtless acts due to youth or inexperience or committed under some special stress, and for these reasons have in them less of the element of culpability. Supplementing these methods is the establishment of disciplinary organizations at the United States Disciplinary Barracks, where the offenders of this class who desire reenlistment or restoration may receive an intensive practical training to fit them for efficient service from the moment of rejoining.

These periods of confinement are graduated so as to prevent inequalities of punishment for like degrees of culpability and are sufficient, it is believed, to meet the ends of punishment where restoration to duty is not in contemplation. Where restoration is in contemplation, as in case of purely military offenders, including deserters, the period of confinement imposed is, under the new policy, in practical effect the maximum of an indeterminate sentence. In other words, the period for which the offender is held depends entirely upon himself. With good conduct and proper progress toward reform evidencing efficiency in training and fitness to resume service relations the sentence of confinement terminates and the honorable status of duty with the colors is resumed.

While it is the effect of this policy to mitigate the condition of the peace deserter who desires to redeem his record and earn an honorable restoration to duty with the colors,

it carries no substantial mitigation as to other classes of deserters. Experience has not thus far demonstrated the wisdom of any change in the policy of severe punishment for this latter class. An engagement for military service has little in common with an ordinary private contract for personal service, and the fact that an individual may abandon such a contract with only minor consequences to himself furnishes no suggestion that a corresponding rule may be properly adopted in the Army. Nor does the fact that the early requirement of the common law that a call to civil office or civil employment under the Government could not be disregarded by the citizen, nor the obligations of such office or employment be laid down at his will, no longer obtains, furnish any such suggestion. An engagement for military service creates a special status, and many obligations flow from that status which are not obligations of the citizen in the civil service of the Government or under a private contract for personal service. Other closely related considerations inherent in the nature of military service support this view. The Army is an emergent arm of the public service which the Nation holds ready for a time of great peril. Military service is an obligation which every citizen owes the Government. It is settled law that such service may be compelled, if necessary, by draft. Nor is the obligation of the soldier who volunteers for a fixed period different from that of the drafted soldier. By his act of volunteering he consecrates himself to the military service. His engagement, supported by an oath of allegiance, is that the Nation may depend upon him for such service during the fixed period, whatever may be the emergency. When this engagement is breached a high obligation to the Nation is disregarded, a solemn oath of allegiance is violated, and the Government is defrauded in the amount of its outlay incident to inducting the soldier into the military service, training, clothing, and caring for him while he remains in that service, and transporting him to the station from which he deserts. Desertion is thus seen to be, not simply a breach of contract for personal service, but a grave crime against the Government; in time of war perhaps the gravest that

a soldier can commit, and at such times punishable with death. These facts furnish ample justification for a continuance of the policy of severe punishment for the offense of desertion in time of peace, subject only to the qualification that it should not be severe to the degree of barring an honorable restoration to duty of the thoughtless, young, or inexperienced offenders who desert and who, on return, manifest a desire to atone for their desertions and qualify themselves in character and training for such restoration by service in the disciplinary battalions and companies now organized at the United States Disciplinary Barracks.

341. Segregation of Prisoners.—It is the policy of the War Department to separate, so far as practicable, general prisoners convicted of offenses punishable by penitentiary confinement from general prisoners convicted of purely military offenses or of misdemeanors in connection with purely military offenses. In furtherance of this policy, reviewing authorities will designate a penitentiary as the place of confinement of general prisoners sentenced to be confined for more than one year according to the rules laid down in Section II, supra, except in individual cases in which the proved circumstances show that the holding of the prisoners so convicted in barracks associations with misdemeanants and military offenders will not be to the detriment of the latter. Instructions will be issued from time to time by the War Department to commanders having general court-martial jurisdiction regarding the place of confinement for general prisoners sentenced to confinement in penitentiaries.

342. Adaptation of Punishments.—In cases where the punishment is discretionary the best interests of the service and of society demand thoughtful application of the following principles: That because of the effect of confinement upon the soldier's self-respect confinement is not to be ordered when the interests of the service permit it to be avoided; that a man against whom there is no evidence of previous convictions for the same or similar offenses should be punished less severely than one who has offended repeatedly; that the presence or absence of extenuating or aggravating circumstances should be taken into considera-

tion in determining the measure of punishment in any case; that the maximum limits of punishment authorized are to be applied only in cases in which, from the nature and circumstances of the offense and the general conduct of the offender, severe punishment appears to be necessary to meet the ends of discipline; and that in adjudging punishment the court should take into consideration the individual characteristics of the accused, with a view to determining the nature of the punishment best suited to produce the desired results in the case in question, as the individual factor in one case may be such that punishment of one kind would serve the ends of discipline, while in another case punishment of a different kind would be required. As an instance of the necessity for adapting punishment to the particular case under consideration, it is to be noted that prior experience with detention of pay by sentence of court-martial indicates that this form of punishment, while not generally applicable, was nevertheless found to be an effective means of restraint and discipline for a considerable number of offenders.

342a. Same Subject—Penitentiary Confinement.—For example, in accordance with the principles of the preceding paragraph, by no means every offense that is legally punishable by confinement in a penitentiary need be so punished in order to uphold justice and discipline in the Army. The dividing line between offenses legally punishable by penitentiary confinement and those which are not so punishable is necessarily, in many cases, more or less arbitrary. For instance, the difference of a single cent in the value of two articles stolen may make the offense in one case grand larceny, legally punishable by penitentiary confinement, and in the other case petty larceny not legally punishable by confinement in such an institution. Accordingly, in considering the place of confinement to be designated, the reviewing authority should take into consideration all of the circumstances, the nature of the offense, the offender's age, his mental condition and development, and his prior civil and military record, with a view to determining whether the interests of justice and discipline demand confinement in a penitentiary where such confinement may be legally directed, or whether confinement in a disciplinary barracks would serve to

vindicate the law and not violate the reformatory character of the disciplinary barracks, or whether any other disposition should be made of the case.

In the cases of youthful offenders, who have not exhibited fixed criminal tendencies and whose offenses are not of such a character as to endanger the future of the disciplinary barracks as a reformatory institution, the propriety of designating the disciplinary barracks, instead of a penitentiary, as the place of confinement should always be carefully considered.

343. Relative severity of punishments.—The usual punishments imposed upon soldiers are the following, beginning with the least severe:

(1) Detention of pay,
(2) Forfeiture of pay,
(3) Reduction,
(4) Hard labor without confinement,
(5) Confinement at hard labor, and
(6) Dishonorable discharge.

In the absence of evidence of two or more previous convictions, a minor offense, the nature of which appears to demand punishment by hard labor, should ordinarily be punished by hard labor without confinement, rather than by confinement at hard labor. For offenses properly punishable by detention of pay, forfeiture of pay, reduction, or hard labor without confinement, those forms of punishment should, as a rule, be resorted to before confinement at hard labor is imposed.

343a. Limits of punishments upon rehearings.—In determining whether or not a punishment adjudged upon a rehearing is in excess of or more severe than a punishment adjudged at the original hearing within the meaning of A. W. 50½, reviewing authorities will be guided by the following, none of the punishments enumerated in any one of the following groups to be regarded as in excess of or more severe than the first punishment mentioned in the same group:

WHEN ACCUSED IS AN OFFICER.

GROUP A.

(1) Death.
(2) All other legal punishments.

GROUP B.

(1) Dismissal with Confinement at Hard Labor.

(2) Dismissal.

(3) Loss of rank or suspension from rank, command, or duty, and fine or forfeiture not in excess of what accused's pay would have been during the period of confinement provided in original sentence and confinement to limits of posts or reservation for period not in excess of period of confinement provided in original sentence and reprimand or admonition; or any one or more of said punishments.

GROUP C.

(1) Dismissal.

(2) Loss of rank or suspension from rank, command, or duty, and fine or forfeiture not to exceed half of one year's pay of the accused and confinement to limits of posts or reservation not to exceed six months and reprimand or admonition; or any one or more of said punishments.

GROUP D.

(1) Loss of rank.

NOTE.—This punishment varies so much that its equivalents can not be stated in the abstract.

GROUP E.

(1) Suspension from Rank, Command, or Duty with Loss of Pay or Part of Pay.

(2) Fine or forfeiture not in excess of loss of pay provided in original sentence and confinement to limits of post or reservation for period not exceeding period of suspension adjudged in original sentence and reprimand or admonition; or any one or more of said punishments.

GROUP F.

(1) Suspension from Rank, Command, or Duty without Loss of Pay.

(2) Confinement to limits of posts or reservation for period not exceeding period of suspension adjudged in original sentence and reprimand or admonition; or any one or more of said punishments.

GROUP G.

(1) Fine or Forfeiture of Pay.

(2) Confinement to limits of post or reservation for such number of months as shall result from dividing the fine or forfeiture adjudged in the original sentence by one-fourth of the monthly pay of the accused and reprimand or admonition; or any one or more of said punishments.

GROUP H.

(1) Confinement to Limits of Post or Reservation.

(2) Reprimand or admonition.

GROUP I.

(1) Reprimand.

(2) Admonition.

NOTE.—The foregoing scale applies also to warrant officers, members of the Army Nurse Corps, and field clerks, so far as practicable.

WHEN ACCUSED IS A SOLDIER.

GROUP A.

(1) Death.

(2) All other legal punishments.

GROUP B.

(1) Dishonorable Discharge with Confinement at Hard Labor.

(2) Dishonorable discharge.

(3) Reduction and deprivation of rating and deprivation of rights and privileges arising from certificate of eligibility to promotion, and confinement at hard labor or hard labor without confinement for period not exceeding period of confinement provided in original sentence, and forfeiture or detention of pay not in excess of what accused's pay would have been for period of confinement in original sentence, and reprimand or admonition; or any one or more of said punishments.

GROUP C.

(1) Dishonorable Discharge.

(2) Reduction and deprivation of rating and deprivation of rights and privileges arising from certificate of eligibility to

promotion, and confinement at hard labor or hard labor without confinement for a period not exceeding six months, and forfeiture or detention of pay for a period not exceeding six months, and reprimand or admonition; or any one or more of said punishments.

GROUP D.

(1) Reduction or Deprivation of Rating or Both of Said Punishments.

(2) Forfeiture or detention of pay for period not in excess of three months and reprimand or admonition.

GROUP E.

(1) Confinement at Hard Labor.

(2) Hard labor without confinement. (See table of equivalents in Executive order.)

(3) Forfeiture or detention of pay. (See table of equivalents in Executive order.)

(4) Reduction and deprivation of rating if period of confinement in original sentence exceeded three months.

(5) Reprimand or admonition.

GROUP F.

(1) Hard Labor without Confinement.

(2) Confinement at hard labor. (See table of equivalents in Executive order.)

(3) Forfeiture or detention of pay. (See table of equivalents in Executive order.)

(4) Reprimand or admonition.

GROUP G.

(1) Forfeiture of Pay.

(2) Confinement at hard labor or hard labor without confinement. (See table of equivalents in Executive order.)

(3) Detention of pay. (See table of equivalents in Executive order.)

(4) Reprimand or admonition.

GROUP H.

(1) Detention of Pay.

(2) Confinement at hard labor or hard labor without confinement or forfeiture of pay. (See table of equivalents in Executive order.)

(3) Reprimand or admonition.

GROUP I.

(1) Reprimand.

(2) Admonition.

SECTION IV.

PROHIBITED PUNISHMENTS.

344. BY STATUTE.—Cruel and unusual punishments of every kind, including flogging, branding, marking, or tattooing on the body, are prohibited. (A. W. 41.)

345. BY CUSTOM AND REGULATIONS.—Many punishments formerly sanctioned have now, under a more enlightened spirit of penology, become so obsolete as to be effectually prohibited by custom without the necessity of regulations; among these are carrying a loaded knapsack, wearing irons (both handcuffs and leg irons—these are now used only in exceptional cases for the purpose of preventing escape and not as a punishment), shaving the head, placarding, pillory, stocks, and tying up by the thumbs. To impose military duty in any form as a punishment must tend to degrade it, to the prejudice of the best interests of the service. Such punishments, therefore, as imposing tours of guard duty or requiring a soldier to sound all calls at the post for a certain period are forbidden. Solitary confinement on a bread and water diet and the placing of a prisoner in irons are regarded as means of enforcing prison discipline. They will not be imposed as a punishment by a court-martial.

SECTION V.

DEATH—COWARDICE—FRAUD.

346. DEATH PENALTY.—No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer

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death, except by the concurrence of all of the members of said court-martial present at the time the vote is taken. Where the death penalty is not mandatory but is discretionary, a conviction may be determined by a two-thirds vote of those members present at the time the vote is taken; but all of the members present at the time the vote is taken on the sentence, must concur in imposing the death sentence.

Courts-martial have no power to impose the death penalty, except for offenses expressly made punishable by death by the Articles of War. (A. W. 43.) A court-martial, in imposing the sentence of death, should not designate the time and place for its execution, such designation not being within its province, but pertaining to that of the reviewing or confirming authority. If it does so designate, this part of the sentence may be disregarded and a different time and place be fixed by the reviewing or confirming authority. (Digest, p. 165, XCVI, B.) If the designated day passes without execution, the same authority or his superior may name another day. Death by hanging is considered more ignominious than death by shooting and is the usual method of execution designated in the case of spies, of persons guilty of murder in connection with mutiny, or sometimes for desertion in the face of the enemy; but in case of a purely military offense, as sleeping on post, such sentence when imposed is usually "to be shot to death with musketry." Hanging is the proper method of executing a death sentence when imposed for violation of A. W. 92. For the sake of example and to deter others from committing like offenses, the death sentence may, when deemed advisable, be executed in the presence of the troops of the command.

347. Cowardice—Fraud—Accessory Penalty.—When an officer is dismissed from the service for cowardice or fraud, the crime, punishment, name, and place of abode of the delinquent shall be published in the newspapers in and about the camp and in the State from which the offender came or where he usually resides; and after such publication it shall be scandalous for an officer to associate with him. **(A. W. 44.)**

The terms "cowardice" and "fraud" as employed in this article refer mainly to the offenses made punishable by A.

W. 75 and 94. With these, however, may be regarded as included all offenses in which fraud or cowardice is necessarily involved, though the same be not expressed in terms in the charge or specification. (Digest, p. 166, C, A.) The publication throughout the United States in press dispatches of "the crime, punishment, name, and place of abode" of the accused is a sufficient compliance with the article. (See Digest, p. 167, C, B.)

SECTION VI.

MAXIMUM LIMITS.

348. BY WHOM PRESCRIBED—WHEN APPLICABLE.—Whenever the punishment for a crime or offense made punishable by these articles is left to the discretion of the court-martial, the punishment shall not exceed such limit as the President may from time to time prescribe: **Provided, that in time of peace the period of confinement in a penitentiary shall in no case exceed the maximum period prescribed by the law which, under article 42 of these articles, permits confinement in a penitentiary, unless in addition to the offense so punishable under such law the accused has been convicted at the same time of one or more other offenses.** (A. W. 45.)

EXECUTIVE ORDER.

MAXIMUM PUNISHMENT.

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349. **Executive order.—The following Executive order becomes operative on February 4, 1921. (See, as to offenses prior to that date, Article IX of the order.)**

THE WHITE HOUSE,
December 10, 1920.

Under authority of Article of War No. 45, as amended by an act of Congress approved June 4, 1920, the following maximum limits of punishments of soldiers are prescribed:

ARTICLE I.

Article of War.	Offenses.	Punishments.					
		Dishonorable discharge, forfeiture of all pay and allowances due and to become due.	Confinement at hard labor, not to exceed—			Forfeiture of two-thirds pay per month, not to exceed—	Forfeiture of pay, not to exceed—
			Years.	Months.	Days.	Months.	Days.
54	Enlistment, fraudulent:						
c[1]	Procured by means of willful misrepresentation or concealment of a fact in regard to a prior enlistment or discharge, or in regard to a conviction of a civil or military offense, or in regard to imprisonment under sentence of a court.	Yes		6			
c	Other cases of	Yes		3			
58	Attempting to desert:						
	After not more than six months in service	Yes		6			
c	After more than six months in service	Yes		9			
	In execution of a conspiracy or in the presence of an unlawful assemblage which the troops may be opposing.	Yes	3				
	Desertion:						
c	Terminated by apprehension—						
	Not more than 6 months in service at time of desertion.	Yes	1				
c	More than 6 months in service at time of desertion.	Yes	2				
	Terminated by surrender—						
c	After absence of not more than 60 days	Yes		9			
	After absence of more than 60 days	Yes	1				
	In the execution of a conspiracy or in the presence of an unlawful assemblage which the troops may be opposing.	Yes	5				
59	Advising another to desert			6		6	
	Assisting knowingly, or persuading another to desert.	Yes	1				
61	Absence without leave:						
	From command, quarters, station, or camp—						
c	For not more than 60 days, for each day or fraction of a day of absence.				3		2
c	For more than 60 days	Yes		6			
	From guard—						
	For not more than 1 hour						15
	For more than 1 hour			3		3	

[1] The letter "c" in the margin indicates that the former limit of punishment is changed by this order.

Articles of War.	Offenses.	Punishments.					
		Dishonorable discharge, forfeiture of all pay and allowances due and to become due.	Confinement at hard labor, not to exceed—			Forfeiture of two-thirds pay per month, not to exceed—	Forfeiture of pay, not to exceed—
			Years.	Months.	Days.	Months.	Days.
	Failing to repair at the fixed time to the properly appointed place of assembly for, or place for:						
	Athletic exercise						
	Drill						
	Fatigue						
	Field exercise						
	Gallery practice						
	Guard mounting						
	Horse exercise						
	Inspection						
	Instruction						3
	Muster						
	Parade						
	Prison guard						
	Review						
	School						
	Stable duty						
	Target practice						
	March			2		2	
	Reveille or retreat roll call						1
	Leaving without permission the properly appointed place of assembly for, or place for:						
	Athletic exercise						
	Drill						
	Fatigue						
	Field exercise						
	Gallery practice						
	Guard mounting						
	Horse exercise						
	Inspection						
	Instruction						5
	Muster						
	Parade						
	Prison guard						
	Review						
	School						
	Stable duty						
	Target practice						
	Reveille or retreat roll call						2
62	Using contemptuous or disrespectful words against the President, Vice President, etc.	Yes	1				
63	Behaving with disrespect toward his superior officer.			6		6	
65	Attempting to strike or attempting otherwise to assault a warrant officer or a noncommissioned officer in the execution of his office.			6		6	
	Behaving in an insubordinate or disrespectful manner toward a warrant officer or a noncommissioned officer in the execution of his office.			2		2	
	Disobedience, willful, of the lawful order of a warrant officer or a noncommissioned officer in the execution of his office.			6		6	
	Striking or otherwise assaulting a warrant officer or a noncommissioned officer in the execution of his office.	Yes	1				

Articles of War.	Offenses.	Punishments.					
		Dishonorable discharge, forfeiture of all pay and allowances due and to become due.	Confinement at hard labor, not to exceed—			Forfeiture of two-thirds pay per month, not to exceed—	Forfeiture of pay, not to exceed—
			Years.	Months.	Days.	Months.	Days.
	Threatening to strike or otherwise assault, or using other threatening language toward a warrant officer or a noncommissioned officer in the execution of his office.	.....	....	4	....	4	.....
	Using insulting language toward a warrant officer or a noncommissioned officer in the execution of his office.	.....	....	2	....	2	.....
68 c	Drawing a weapon upon a nurse, band leader, warrant officer, field clerk, or a noncommissioned officer quelling a quarrel, fray, or disorder.	Yes.....	3	....	....	.....	.....
c	Refusing to obey a nurse, band leader, warrant officer, field clerk, or a noncommissioned officer quelling a quarrel, fray, or disorder.	Yes.....	1	....	....	.....	.....
c	Threatening a nurse, band leader, warrant officer, field clerk, or a noncommissioned officer quelling a quarrel, fray, or disorder.	.....	....	6	....	6	.....
69	Breach of arrest	.....	....	1	....	1	.....
	Escaping from confinement	Yes.....	1	....	....	.....	.....
73	Releasing, without proper authority, a prisoner committed to his charge.	Yes.....	1	....	....	.....	.....
	Suffering a prisoner committed to his charge to escape:						
	Through design	Yes.....	1	....	....	.....	.....
	Through neglect	.....	....	6	....	6	.....
83	Suffering, through neglect, military property to be damaged, lost, spoiled, or wrongfully disposed of:						
	Of a value of $20 or less	.....	....	3	....	3	.....
	Of a value of $50 or less and more than $20	.....	....	6	....	6	.....
	Of a value of more than $50	Yes.....	1	....	....	.....	.....
	Suffering, willfully, military property to be damaged, lost, spoiled, or wrongfully disposed of:						
	Of a value of $20 or less	.....	....	6	....	6	.....
	Of a value of $50 or less and more than $20	Yes.....	....	6	....	.....	.....
	Of a value of more than $50	Yes.....	2	....	....	.....	.....
84	Injuring or losing, through neglect, horse, arms, ammunition, accouterments, equipment, clothing, or other property issued for use in the military service, or items belonging to two or more of said classes:						
	Of a value of $20 or less	.....	....	3	....	3	.....
	Of a value of $50 or less and more than $20	.....	....	6	....	6	.....
	Of a value of more than $50	Yes.....	1	....	....	.....	.....
	Injuring or losing, willfully, horse, arms, ammunition, accouterments, equipment, clothing, or other property issued for use in the military service, or items belonging to two or more of said classes:						
	Of a value of $20 or less	.....	....	6	....	6	.....
	Of a value of $50 or less and more than $20	Yes.....	....	6	....	.....	.....
	Of a value of more than $50	Yes.....	2	....	....	.....	.....
	Selling or otherwise wrongfully disposing of horse, arms, ammunition, accouterments, equipment, clothing, or other property issued for use in the military service, or items belonging to two or more of said classes:						
	Of a value of $20 or less	Yes.....	....	6	....	.....	.....
	Of a value of $50 or less and more than $20	Yes.....	1	....	....	.....	.....
	Of a value of more than $50	Yes.....	5	....	....	.....	.....

Articles of War.	Offenses.	Punishments.					
		Dishonorable discharge, forfeiture of all pay and allowances due and to become due.	Confinement at hard labor, not to exceed—			Forfeiture of two-thirds pay per month, not to exceed—	Forfeiture of pay, not to exceed—
			Years.	Months.	Days.	Months.	Days.
85	Found drunk:						
	At formation for or at—						
	Athletic exercise						
	Drill						
	Fatigue						
	Field exercise						
	Gallery practice						
	Guard mounting						
	Horse exercise						
	Inspection						20
	Instruction						
	March						
	Muster						
	Parade						
	Review						
	School						
	Stable duty						
	Target practice						
	Reveille or retreat roll call						5
	On guard			6		6	
	On duty as—						
	Barrack orderly						
	Company clerk						
	Cook						
	Dining room orderly						
	Farrier						
	Horseshoer						
	Kitchen police						
	Mechanic						20
	Mess sergeant						
	Noncommissioned officer in charge of quarters						
	Saddler						
	Stable sergeant						
	Supply sergeant						
	Wagoner						
86c	Found sleeping or drunk on post, sentinel	Yes.		6			
	Leaving post before regularly relieved from, sentinel.	Yes.	1				
90	Using a provoking or reproachful speech or gesture to another.			3		3	
93	Arson	Yes.	20				
c	Assault:						
c	With intent to do bodily harm	Yes.	1				
	With intent to do bodily harm with a dangerous weapon, instrument, or other thing.	Yes.	5				
	With intent to commit any felony except murder or rape.	Yes.	10				
	With intent to commit murder or rape	Yes.	20				
	Burglary	Yes.	10				
	Embezzlement or larceny:						
	Of property of a value of $20 or less	Yes		6			
	Of property of a value of $50 or less, and more than $20.	Yes	1				
	Of property of a value of more than $50	Yes	5				

Articles of War.	Offenses.	Punishments.						
		Dishonorable discharge, forfeiture of all pay and allowances due and to become due.	Confinement at hard labor, not to exceed—			Forfeiture of two-thirds pay per month, not to exceed—	Forfeiture of pay, not to exceed—
			Years.	Months.	Days.	Months.	Days.
	Forgery	Yes	5				
	Housebreaking	Yes	10				
	Manslaughter:						
	Involuntary, in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution or circumspection.	Yes	3				
	Voluntary, upon a sudden quarrel or heat of passion.	Yes	10				
	Perjury	Yes	5				
	Robbery	Yes	10				
	Sodomy	Yes	5				
94	Forging or counterfeiting a signature, making a false oath, and offenses related to either of these.	Yes	5				
	Other cases:						
c	When the amount involved is $20 or less	Yes		6			
c	When the amount involved is $50 or less, and more than $20.	Yes	1				
	When the amount involved is more than $50.	Yes	5				
96	Abandoning guard, by member thereof			6		6	
	Abusing a public animal			3		3	
	Allowing a prisoner to receive or obtain intoxicating liquor.			3		3	
	Appearing in civilian clothing without authority.						10
	Appearing in unclean uniform, or not in prescribed uniform, or in uniform worn otherwise than in manner prescribed.			1		1	
	Assault			3		3	
	Assault and battery			6		6	
	Attempting to escape from confinement	Yes		6			
	Attempting to strike or attempting otherwise to assault a sentinel in the execution of his duty.			6		6	
	Behaving in an insubordinate or disrespectful manner toward a sentinel in the execution of his duty.			1		1	
	Breach of restriction (other than quarantine) to command, quarters, station, or camp.			1		1	
	Carrying a concealed weapon			3		3	
	Committing a nuisance			3		3	
	Concealing, destroying, mutilating, obliterating, or removing willfully and unlawfully a public record, or taking and carrying away a public record with intent to conceal, destroy, mutilate, obliterate, remove, or steal the same.	Yes	3				
	Conspiring to escape from confinement	Yes		6			
	Destroying willfully, public property:						
	Of a value of $20 or less	Yes		6			
	Of a value of $50 or less, and more than $20.	Yes	1				
	Of a value of more than $50	Yes	5				
	Discharging, through carelessness, a firearm			3		3	
	Disobedience, willful, of the lawful order of a sentinel in the execution of his duty.	Yes	1				

Articles of War.	Offenses.	Punishments.					
		Dishonorable discharge, forfeiture of all pay and allowances due and to become due.	Confinement at hard labor, not to exceed—			Forfeiture of two-thirds pay per month, not to exceed—	Forfeiture of pay, not to exceed—
			Years.	Months.	Days.	Months.	Days.
	Disorderly in command, quarters, station, or camp.	....	....	1	....	1	.....
	Disorderly under such circumstances as to bring discredit upon the military service.	....	....	4	....	4	.....
	Drinking liquor with prisoner	....	....	2	....	2	.....
	Drunk and disorderly in command, quarters, station, or camp.	....	....	3	....	3	.....
	Drunk and disorderly under such circumstances as to bring discredit upon the military service.	....	....	6	....	6	.....
	Drunk in command, quarters, station, or camp.	....	....	....	....	.....	15
	Drunk under such circumstances as to bring discredit upon the military service.	....	....	3	....	3	.....
	Drunk, prisoner found	....	....	3	....	3	.....
	Failing to obey a lawful order:						
c	Of a superior officer	....	....	6	....	6	.....
c	Of a noncommissioned officer	....	....	3	....	3	.....
c	Of a sentinel	....	....	3	....	3	.....
	Failing to pay a just debt under such circumstances as to bring discredit upon the military service.	Yes	....	6	....	.....	.....
	False official report or statement knowingly made:						
	By a noncommissioned officer	....	....	3	....	3	.....
	By any other soldier	....	....	1	....	1	.....
	False swearing	Yes	3	....	....	.....	.....
	Gambling:						
	By a noncommissioned officer with a person of lower military rank or grade.	....	....	....	....	3	.....
	In command, quarters, station, or camp in violation of orders.	....	....	2	....	2	.....
	Indecent exposure of person	....	....	3	....	3	.....
	Introducing a habit-forming narcotic drug into command, quarters, station, or camp:						
	For sale	Yes	2	....	....	.....	.....
	All other cases	Yes	1	....	....	.....	.....
	Introducing intoxicating liquor into command, quarters, station, or camp:						
	For sale	....	....	6	....	6	.....
	All other cases	....	....	3	....	3	.....
	Loaning money, either as principal or agent, at an usurious rate of interest to another in the military service.	....	....	....	....	3	.....
	Loitering or sitting down on duty by sentinel	....	....	1	....	1	.....
	Obtaining money or other property under false pretenses:						
	When the amount obtained is $20 or less	Yes	....	6	....	.....	.....
	When the amount obtained is $50 or less and more than $20.	Yes	1	....	....	.....	.....
c	When the amount obtained is more than $50.	Yes	3	....	....	.....	.....
	Refusing to submit to medical or dental treatment.	Yes	6	....	....	.....	.....
	Refusing to submit to a surgical operation	Yes	1	....	....	.....	.....
	Unnatural crimes	Yes	5	....	....	.....	.....
	Straggling	....	....	3	....	3	.....

Articles of War. Offenses.	Punishments.					
	Dishonorable discharge, forfeiture of all pay and allowances due and to become due.	Confinement at hard labor, not to exceed—			Forfeiture of two-thirds pay per month, not to exceed—	Forfeiture of pay, not to exceed—
		Years.	Months.	Days.	Months.	Days.
Striking or otherwise assaulting a sentinel in the execution of his duty.	Yes	1				
Subornation of perjury	Yes	5				
Threatening to strike or otherwise assault or using other threatening language toward a sentinel in the execution of his duty.			4		4	
Unclean accouterment, arm, clothing, equipment, or other military property, found with.			1		1	
Using insulting language toward a sentinel in the execution of his duty.			3		3	
Violation of condition of parole by general prisoner.			3			

ARTICLE II.

EQUIVALENTS.

Subject to the limitations set forth elsewhere in this order, substitutions for punishments specified in Article I thereof are authorized at the discretion of the court, at the rates indicated in the following table of equivalents:

Forfeiture.	Confinement at hard labor.	Detention.	Hard labor without confinement.
1 day's pay.	1 day.	1½ days' pay.	1½ days.

ARTICLE III.

GENERAL LIMITATIONS.

SECTION 1. A court shall not, by a single sentence which does not include dishonorable discharge, adjudge against a soldier:

(*a*) Forfeiture of pay at a rate greater than two-thirds of his pay per month.

(*b*) Forfeiture of pay in an amount greater than two-thirds of his pay for six months.

(*c*) Confinement at hard labor for a period greater than six months.

SEC. 2. A court shall not, by a single sentence, adjudge against a soldier:

(*a*) Detention of pay at a rate greater than two-thirds of his pay per month.

(*b*) Detention of pay in an amount greater than two-thirds of his pay for three months.

(*c*) Hard labor without confinement for a period greater than three months.

ARTICLE IV.

NONCOMMISSIONED OFFICERS.

SECTION 1. No court shall adjudge confinement at hard labor or hard labor without confinement against a noncommissioned officer unless in the same sentence reduction to the grade of private shall also be adjudged.

SEC. 2. Upon the conviction of a noncommissioned officer or a private first class, of an offense or offenses for which confinement at hard labor for a period of more than five days, authorized substitutions considered, may be adjudged the court may, in addition to the punishments otherwise authorized, adjudge reduction to the grade of private.

ARTICLE V.

PREVIOUS CONVICTIONS.

SECTION 1. A general or special court shall, upon conviction of the accused, be opened and shall thereupon ascertain whether there is evidence of a previous conviction or convictions, which has been referred to the court by the convening authority, and, if there be such evidence, shall receive it.

SEC. 2. A court may, under the authority contained in section 1 of this article, receive evidence, in the cases of officers, warrant officers, members of the Army Nurse Corps, and field clerks, only of convictions by court-martial of an offense or offenses committed by the accused during his status as such officer, warrant officer, member of the Army Nurse Corps, or field clerks, and within three years next preceding the commission by him of an offense of which he stands convicted before the court. In the case of soldiers it will be limited to that pertaining to convictions by courts-martial of an offense or offenses committed during his current enlistment and within one year next preceding the commission by him of an offense of which he stands convicted before the court. These convictions may be proved only by the records of the trials in which they were had, or by duly authenticated copies of such records, or by duly authenticated copies of orders promulgating such convictions.

ARTICLE VI.

DISHONORABLE DISCHARGE.

SECTION 1. A court may, upon his conviction of an offense or offenses for none of which dishonorable discharge and forfeiture of

all pay and allowances due and to become due is, in Article I of this order or by the custom of the service, authorized, upon proof of five or more previous convictions, adjudge against a soldier, in addition to the confinement at hard labor without substitution authorized in said article or by the custom of the service for the offense or offenses of which he is convicted, dishonorable discharge and forfeiture of all pay and allowances due and to become due, and, in any such case in which such confinement so authorized is less than three months, a court may adjudge, in addition to such discharge and forfeiture, confinement at hard labor for three months.

SEC. 2. A court may, upon his conviction upon one arraignment of two or more offenses for none of which dishonorable discharge, confinement at hard labor and forfeiture of all pay and allowances due and to become due is in Article I of this order or by the custom of the service authorized, but the aggregate term of confinement at hard labor for which, as authorized in said article or by the custom of the service, without substitution, equals or exceeds six months, adjudge against a soldier, in addition to the confinement at hard labor, without substitution, authorized in said article or by the custom of the service for the offense or offenses of which he is convicted, dishonorable discharge and forfeiture of all pay and allowances due and to become due.

ARTICLE VII.

EFFECT AND APPLICATION OF THIS ORDER.

SECTION 1. This order prescribes the maximum limit of punishment for each of the offenses therein specified, and thus indicates an appropriate punishment for an offense which is attended by aggravating circumstances. Evidence of previous convictions admitted under Article V of this order may always be considered in determining the proper measure of punishment; but evidence of previous convictions of offenses materially less grave than the offense or offenses for which sentence is to be adjudged is not to be regarded as in itself justifying a sentence of maximum severity. In every case in which the prescribed or customary maximum penalty exceeds confinement at hard labor or forfeiture of pay for 10 days and in which the offense is not attended by aggravating circumstances the punishment will be graded down according to the circumstances of the offense; and if for any reason the court-martial fails so to grade down the punishment, it will be the duty of the reviewing authority to do so.

SEC. 2. Offenses not herein provided for remain punishable as authorized by statute or the custom of the service; but, in cases for which maximum punishments are not prescribed, courts will be guided by the limits of punishment prescribed for closely related offenses.

SEC. 3. Dishonorable discharge, in itself a severe punishment, should be adjudged and approved only when it is clear that the accused should be separated from the service or that he should be required to undergo a period of reformatory discipline before he can again be permitted to

serve in an organization composed of honorable men. When the accused is relatively young and his record, except for the offense of which he stands convicted, is good, the reviewing authority should, in the exercise of his sound discretion, suspend the execution of the dishonorable discharge, to the end that the offender may have an opportunity to redeem himself in the military service; but he should not suspend the execution of the dishonorable discharge in any case of conviction of an offense involving that degree of moral turpitude which disqualifies for further military service.

SEC. 4. The reviewing authority should suspend the whole of a sentence when it appears to him that such action will promote the discipline of his command.

ARTICLE VIII.

ADMINISTRATIVE RULES.

SECTION 1. Hard labor without confinement, when imposed as a punishment, shall be performed in addition to other duties which fall to the soldier, and no soldier shall be excused or relieved from any military duty for the purpose of performing hard labor without confinement which has been imposed as a punishment, but a sentence imposing such punishment shall be considered as satisfied when the soldier shall have performed hard labor during available time in addition to performing his military duties.

SEC. 2. Pay detained pursuant to the sentence of a court-martial will be detained by the Government until the soldier is discharged from the service or mustered out of active Federal service.

ARTICLE IX.

DATE ON WHICH OPERATIVE.

This order shall become operative on February 4, 1921, as to offenses committed on and after that date and as to criminal acts committed prior to that date whose maximum punishment was not prescribed in the Executive order of December 15, 1916. The Executive order of December 16, 1916, published in the Manual for Courts-Martial, 1917, prescribing limits of punishment, shall remain operative as to offenses committed before February 4, 1921, except as to criminal acts whose maximum punishment has been decreased by this order, which will not be followed by severer punishment than is hereinbefore prescribed.

WOODROW WILSON.

THE WHITE HOUSE,
December 10, 1920.

CHAPTER XIV.

COURTS-MARTIAL—PROCEDURE OF SPECIAL AND SUMMARY COURTS AND PROCEDURE ON REVISION.

Section I. courts-martial: Page.
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Section II. Summary courts-martial:
351. Procedure (*a*) to (*j*) 287
Section III. Procedure on revision:
352. Of general or special courts-martial 289
353. Of summary courts-martial 290

SECTION I.

SPECIAL COURTS-MARTIAL.

350. PROCEDURE.—The procedure of and before special courts-martial will, so far as practicable, be identical with that prescribed for general courts-martial.

SECTION II.

SUMMARY COURTS-MARTIAL.

351. PROCEDURE.—(*a*) The summary court will be opened at a stated hour daily, except Sundays, for the trial of such cases as have been properly referred to it for trial. Trials will be had on Sunday only when the exigencies of the service make it necessary.

(*b*) The summary court will at the beginning of each trial, in the order of such trial, give to and enter in the proper place on the charges in the case a serial number.

(*c*) The procedure of and before summary courts-martial will, so far as practicable, be identical with that prescribed for general courts-martial. In the trial of a case the summary court represents both the Government and the accused. He will see to it that the interests of both are fully conserved.

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(*d*) When the accused pleads guilty he will—

(1) Explain to him (*a*) the elements constituting the offense to which he has pleaded guilty, and (*b*) the maximum punishment therefor.

(2) Ask him whether he fully understands (*a*) that by pleading guilty thereto he admits all the elements of the crime or offense, and (*b*) that he may be punished as explained to him. (For form see Appendix 9, infra.) The report of trial will show that such explanation was made. (See Appendix 12, infra.)

In any such case he will also, in the manner below stated, make such impartial investigation as the doing of justice may appear to require.

(*e*) In the absence of a plea of guilty he will make a full, thorough, and impartial investigation of both sides of the entire matter before him. On behalf of the accused he will obtain the attendance of, swear, and examine such witnesses, and will obtain such other evidence, documentary and other, as may tend to disprove or negative guilt of such allegations, or explain the acts or omissions charged, or show extenuating circumstances or establish good character. He will permit the accused fully to examine all witnesses that appear, and will, to the fullest extent, aid him in making such examination. He will, in every proper way, encourage and aid the accused in making his defense. In all cases he will extend to the accused full opportunity to testify in his own behalf and to make a statement in denial, in explanation, or in extenuation, and will, before arriving at a finding, assure himself, by inquiry of the accused, that he has no further testimony to offer and no further statement to make.

(f) If the accused does not testify or make any statement in his own behalf, the summary court will explain to him that he may testify in his own behalf if he so desire, or may make an unsworn statement to the court in denial, in explanation, or in extenuation of the offense with which he stands charged. (See Form 4, Appendix 9.) The report of trial will show that such explanation was made. (Par. 215, infra.)

(*g*) Having done so, he will, as soon as the trial is concluded, arrive at his findings and record them in the proper place on the charges.

(*h*) In the event of conviction he will consider the evidence of previous convictions, if any, referred to him.

(*i*) In any case of conviction he will, as soon as trial is concluded, impose sentence and record it in the proper place upon the charges.

(*j*) In the event of a finding of not guilty of all the charges and specifications he will record an acquittal instead of a sentence, and immediately announce it in open court. (A. W. 29.)

(*k*) Having recorded his findings and an acquittal or sentence, he will subscribe his name, rank, and organization as summary court, and then without delay transmit the record of trial to the appointing authority.

SECTION III.

PROCEDURE ON REVISION.

352. OF GENERAL OR SPECIAL COURTS-MARTIAL.—The procedure of general or special courts-martial when reconvened for the purpose of revising their action or correcting their records will in general be as indicated by the form of record of proceedings on revision. (See Appendix 10 and par. 364, infra.) The members of the court who participated in the findings and sentence, together with the trial judge advocate and assistant trial judge advocate, if any, and—except in those rare cases where a sentence which, under paragraph 332a, supra, was not announced in open court is directed to be reconsidered by the court—the defense counsel of the court and assistant defense counsel, if any, will assemble and the court will meet. It is not ordinarily necessary that the accused or his individual counsel, if any, be present, but except in rare cases there is no objection to their presence, and there may be cases in which the presence of the accused and of his individual counsel, if any, should be required by the court. The trial judge advocate will read to the court the indorsement of the appointing authority returning the record and di-

recting the reconvening, or if the record of trial by a special court-martial has been returned to him orally for revision, may state briefly to the court the views of the appointing authority as communicated to him. The court is then closed, considers and takes action upon the matter before it, is opened, and adjourns. As the action so taken is entirely corrective, a case will not be reopened by the calling or recalling of witnesses or otherwise.

"No authority shall return a record of trial to any court-martial for reconsideration of—

(a) An acquittal; or

(b) A finding of not guilty of any specification; or

(c) A finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of war; or

(d) The sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.

And no court-martial, in any proceedings on revision, shall reconsider its findings or sentence in any particular in which a return of the record of trial for such reconsideration is hereinbefore prohibited." (A. W. 40.)

353. Of Summary Courts-martial.—What has been said in respect to the procedure on revision by general or special courts-martial will, so far as applicable, govern such procedure by summary courts-martial. (See also par. 365, infra.)

CHAPTER XV.

COURTS-MARTIAL—RECORDS OF TRIAL.

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SECTION I.

GENERAL COURTS-MARTIAL.

354. RECORD REQUIRED—HOW AUTHENTICATED.—Each general court-martial shall keep a separate record of its proceedings in the trial of each case brought before it, and such

record shall be authenticated by the signature of the president and the trial judge advocate, but in case the record can not be authenticated by the president and the trial judge advocate, by reason of the death, disability, or absence of either or both of them, it shall be signed by a member in lieu of the president, and by an assistant trial judge advocate, if there is one, in lieu of the trial judge advocate, otherwise by another member of the court. (A. W. 33.)

355. What the Record Is and by Whom Prepared.—The legal record of a court-martial is that record which is finally approved and adopted by the court as a body and authenticated by the signatures of its president and the trial judge advocate. The record is prepared by the trial judge advocate under the direction of the court, and in consultation with the defense counsel of the court to whom it is submitted (except findings and sentence in cases where the same are not announced) for examination before signature, but the court as a whole is responsible for it, and the instrument which it approves as such is its record, however the same may have been made up. It is immaterial to the sufficiency of a record whether the same was kept or written by the trial judge advocate or by a clerk or a reporter acting under his direction.

355a. Carbon Copy of the Record.—Whenever a record of a trial by general court-martial is to be typewritten by a reporter (see Par. 117, supra), a carbon copy will always be prepared, and, if not desired by the accused (see Par. 366 (b), infra), will be forwarded, with the record, to the reviewing authority.

356. Separate Record.—Where several cases are tried by the same court the record of each case should not only be complete and independent in itself and as much an entirety, both in form and in substance, as if it were the only case tried, but should contain all that is essential to an original and independent official paper, and should be so perfected as to leave no material detail to be supplied from any previous or other record. Where sentence is pronounced the record should contain everything necessary to sustain it in fact and in law.

357. Contents of Record.—(*a*) *In General.*—The record of proceedings of a general court-martial will in each case

show that all statutory requirements incident to that case have been complied with; will state a complete history of the proceedings, regular and irregular, had in open court in that case; and will set forth the material conclusions arrived at in both open and closed sessions. The only acts of the court or members not properly stated or set forth in the record of trial are the discussions, votes, etc., had while the court was closed for deliberation upon a challenge, or upon the findings or sentence. Such discussions, etc., are no part of the formal record, and, as to votes and opinions of particular members upon a challenge or upon the findings or sentence, a statement of these is precluded by A. W. 19. It is, in fact, only the result of a deliberation in closed session that is to be entered upon the record; except that it must appear therefrom that such result was reached by the concurrence of the number of votes required, as the case may be, by the forty-third article of war.

(*b*) *In Detail.*—The record of proceedings in each case will show, among other things, each in its proper place:

1. A brief of itself in the prescribed form. (See Appendix 10, infra.)

2. An index of itself in the prescribed form. (See Appendix 10, infra.)

3. Whether a carbon copy of the record of trial was prepared and, if so, the disposition made thereof. (See pars. 117 and 355a, supra, and 366 (b), infra.)

4. The place and date of each meeting of the court.

5. The fact and hour of each meeting.

6. The number, date, source, and a copy of the order appointing the court, and of each amendatory order, each stated at the proper place in the record of trial.

7. The fact of the presence and the name, rank, and organization of each member, including (and so designating) the law member, if present, the trial judge advocate, the assistant trial judge advocate, the defense counsel, the assistant defense counsel, and the individual counsel for the accused, if there be one, present at the assembling of the court, and at any proceedings in revision.

8. The fact of the presence and the name, rank, and organization of each new member (including law member), new

trial judge advocate or assistant trial judge advocate, or new defense counsel or assistant defense counsel, who begins to participate therein, together with citation of the authority for his so doing.

9. The fact of the absence and the name, rank, and organization of each member, including the law member, and of the trial judge advocate or assistant trial judge advocate, or defense counsel or assistant defense counsel, absent at the assembling of the court or at any reassembly after recess or adjournment, or at any proceedings in revision, together with a statement of the reason for such absence.

10. That the accused was given opportunity to introduce individual counsel, and the action thereon.

11. That the defense counsel and assistant defense counsel (or at least one of them at all times) were present during all the open sessions of the court in the case (unless excused at the express request of the accused, under par. 107(b), supra, in which case that fact will be stated in the record); and that the accused and his individual counsel, if any, were present during all the open sessions of the court in his case (except during proceedings in revision in which it will be shown whether or not they were present; and, in those rare cases in which, under paragraph 352 supra, their presence is improper during revision proceedings, the record will show their absence during such proceedings).

12. The name (and if in the military service, grade, and organization) of each person who acted as reporter during any part of the trial, and that each such person was sworn.

13. The name, rank, and organization of each member present who, during the trial, was challenged by either party, or who announced himself as, or was alleged to be, ineligible to sit as a member, together with the alleged reason therefor, and the action had thereon.

14. The name of each person, if any, who acted as interpreter during any part of the trial, and that each such person was sworn.

15. That the accused was informed of his right to demand a copy of the record of his trial, and was asked whether or not he desired a copy thereof, together with his answer thereto.

16. That the order appointing the court and each amendatory order was read to the accused in court, and that he was given opportunity to challenge each member of the court (including an opportunity to exercise his right to one peremptory challenge in accordance with the provisions of A. W. 18) who sat as such during any part of the trial in his case, and the action had thereon.

17. That each member of the court who sat as such during any part of the trial of the case and each trial judge advocate and assistant trial judge advocate who appeared before the court in the case was sworn.

18. The several charges and specifications upon which the accused was arraigned, including the signature and the oath thereto, by the person preferring them, required by A. W. 70.

19. The name, grade, and organization of the person who subscribed the charges and swore to them.

20. The pleas of the accused to the several specifications and charges upon which he was arraigned.

21. In a proper case, that the law member if present, or otherwise the president, advised the accused of his legal right to plead the statute of limitations.

22. That after a plea of guilty the law member if present, or otherwise the president, in substance in the form prescribed in Appendix 9, infra—

(*a*) Explained to the accused (1) the elements constituting the offenses to which he pleaded guilty; and (2) the maximum punishment for each such offense; and also

(*b*) Asked the accused if he fully understood (1) that by pleading guilty thereto he admitted all the elements of the crime or offense; and (2) that he may be punished as explained to him.

23. The answers of the accused thereto, and the action, if any, had thereon.

24. That the trial judge advocate read to the court the paragraphs of the Manual for Courts-Martial that set out the gist of the offense or offenses charged (stating specifically which paragraphs and parts of paragraphs were so read).

25. That the several witnesses were sworn.

26. In a proper case, that the law member if present, or otherwise the president, advised a witness ignorant of his rights that he might decline to answer any question where his answer might tend to incriminate him, or to answer any question not material to the issue when such answer might tend to degrade him. (A. W. 24.)

27. That each witness recalled to testify was cautioned, upon being so recalled, that he was still under oath.

28. That, if the accused was sworn as a witness, he was so sworn at his own request.

29. The questions propounded and the answers given by each of the several witnesses, as nearly as possible in the language used.

30. That the accused was given full opportunity to examine each witness called or recalled for the defense, and to cross-examine each witness called or recalled by the prosecution or by the court.

31. The fact of the introduction of each deposition and other paper received in evidence by the court and what parts were offered by either side, or were not offered, or were excluded, and that it is appended to the record properly marked.

32. The exact and entire text read to the court by the prosecution or defense from any publication, together with the title of the publication, the edition thereof, and the proper page (or paragraph or section) number.

33. In a proper case, that the accused had no testimony, or no further testimony, to offer, or no statement to make, or both.

34. That when the accused did not testify or make a statement the law member if present, or otherwise the president, explained to him in open court in substantially the form prescribed in Appendix 9, infra, that he might testify in his own behalf if he so desired; or might, without being sworn, make a statement in denial, in explanation, or in extenuation; or might do both.

35. Each motion, objection, argument, statement, etc., made in open court, and the action, if any, had thereon.

36. The fact of each closing of the court.

37. The fact of each opening of the court, and that the members (including, and so designating, the law member), trial judge advocate, assistant trial judge advocate, defense counsel, assistant defense counsel, the accused and his individual counsel, if any, and the reporter, if any, were present when the court was opened (without, however, repeating their names, in recording any reopening, except where necessary because of changes or absences).

38. If a note was made of recess taken, that the members (including, and so designating, the law member), the trial judge advocate, assistant trial judge advocate, defense counsel, assistant defense counsel, the accused and his individual counsel, and the reporter, if any, were present when the court again proceeded to business.

39. In a joint trial, that each and every one of the several accused was accorded each and every right and privilege he would enjoy if tried separately; and, as to each accused, proper findings and sentence or acquital. (The end here sought, however, will, so far as practicable, be attained by the use of appropriate general language without unduly burdening the record with repetitions.)

40. The findings on each of the several specifications and charges not disposed of as a result of a special plea.

41. The fact that each finding, as to each specification, and also as to each charge, was determined by secret written ballot. (A. W. 31.)

42. That, after the findings, the court was opened for the purpose of receiving evidence of previous convictions, and its action.

43. That the statement of accused's service, as shown on the charge sheet, was thereupon read to him by the trial judge advocate, and he was asked whether it was correct, or whether he had any statement, or correction, to make concerning it, and his answers thereto.

44. In case of receipt by the court of evidence of previous convictions, that a copy of each is appended to the record, properly marked.

45. In case of the receipt of evidence of previous convictions, that the accused was asked whether the evidence of such

previous convictions was correct, and whether he had any statement to make in explanation or extenuation thereof, or in relation thereto, and his answers.

46. The sentence, acquittal, or other action finally taken, and that the same were (or were not) announced in open court; and, if not so announced, the reasons therefor.

47. In case of conviction of an offense for which the death penalty is made mandatory by law, that all of the members of the court present at the time the vote was taken concurred in such findings of guilty, both as to the specification and also as to the charge. (A. W. 43.)

48. As to every other finding of guilty, whether upon a specification or a charge, that two-thirds of the members of the court present at the time the vote was taken concurred therein. (A. W. 43.)

49. In case of a sentence to suffer death, that all of the members of the court present at the time the vote was taken concurred in the sentence. (A. W. 43.)

50. In case of sentence of life imprisonment or to confinement for more than 10 years, that three-fourths of the members of the court present at the time the vote was taken concurred therein.

51. In case of any sentence other than death, life imprisonment, or confinement for more than 10 years, that two-thirds of the members of the court present at the time the vote was taken concurred therein. (A. W. 43.)

52. The adjournment.

53. That the trial judge advocate, or in a proper case, the assistant trial judge advocate, subscribed each day's proceedings.

54. That the president and the trial judge advocate; or, in a proper case, the president and an assistant trial judge advocate; or, in a proper case, a member in lieu of the president, and the trial judge advocate; or, in a proper case, a member in lieu of the president, and the assistant trial judge advocate; or, in a proper case, a member in lieu of the president, and another member in lieu of the trial judge advocate if there is no assistant trial judge advocate; or, in a proper case, a member in lieu of the president, and another member in lieu of both the trial judge advocate and assistant trial judge advocate if both are

unable to authenticate the record, subscribed the record. In any case where the record is subscribed by a member in lieu of the president, or by the assistant trial judge advocate or another member in lieu of the trial judge advocate, or by another member in lieu of both the trial judge advocate and assistant trial judge advocate, the facts which make such action proper will appear in the record by the signature, as follows:

Name and rank. A member in lieu of the president, because of his (death) (disability) (absence).

Name and rank. Assistant trial judge advocate, because of (death) (disability) (absence) of trial judge advocate.

Name and rank. A member in lieu of trial judge advocate, because of his (death) (disability) (absence). (This to be used where no assistant trial judge advocate was appointed for the court.)

Name and rank. A member in lieu of trial judge advocate and assistant trial judge advocate, because of (death) (disability) (absence) of trial judge advocate, and of (death) (disability) (absence) of assistant trial judge advocate.

55. In case the trial judge advocate has recorded the findings and sentence with a typewriter, then a certificate that he recorded the findings and sentence of the court, in those exceptional cases only, where the sentence has, under the provisions of paragraph 332a, supra, been directed by the court not to be announced in open court.

56. Appended to the record (but not as exhibits, except where received in evidence at the trial), and securely bound with it, will be—

(1) The original counterpart of the charges upon which is indorsed—

(2) The order referring the case for trial; together with one copy of each of—

(3) The report of the investigating officer, with—

(4) The summaries of the testimony of the witnesses, and the report, if any, of the medical officer, on the preliminary investigation, and all other accompany-

ing documents and inclosures and indorsements thereon, and including—

(5) The report of the staff judge advocate under paragraph 76b, supra, and—

(6) The report of any medical board convened either under paragraph 76c or paragraph 219d, supra.

57. Where the trial was a rehearing of the case there will also be similarly appended the record of trial on the prior hearing or hearings, including the original order referring the case for such rehearing, together with all other papers and documents referred to the trial judge advocate under paragraph 377a, infra.

(*c*) *Record of Revision.*—Subject to the modifications indicated by the form of proceedings in revision, Appendix 10, infra, the foregoing will, so far as applicable, govern in respect to such proceedings.

(*d*) *Clemency Recommendation.*—A recommendation to clemency will not be embodied in the record proper, but will be bound into the record immediately after the exhibits. (See par. 332.)

SECTION II.

SPECIAL COURTS-MARTIAL.

358. FORM AND SUBSTANCE.—(*a*) Except as otherwise indicated by the form for record of trial by special court, or elsewhere, the requirements in respect of the form and substance of such records are in general the same as for records of trial by general courts-martial. (See form, Appendix 11.)

(*b*) Neither oral testimony received by the court nor statements or arguments made will be recorded unless herein specifically required, or ordered by competent authority (see par. 154 (*d*)); but (except in cases where the testimony is ordered recorded) a brief written summary of the testimony (including at length any questions to which objection is made, and the action of the court thereon, whether sustaining or overruling the objection, and the answers thereto, if answered) of each witness (and of the accused, if sworn as a witness), and

also of any statements or arguments, will be made in open court by the president, or by one of the other members under the direction of the president, and will be made a part of the record.

(*c*) Documentary evidence received by the court, the originals of which can properly be appended to the record, such as depositions, letters, canceled checks, if not required elsewhere, and other documents, and also any written statement or argument made by or on behalf of the accused, and any recommendations to clemency, and other similar papers, will be so appended.

(*d*) Copies of writings received in evidence, the originals of which can not properly be appended to the record, such as certificates of discharge, recommendations as to character, and similar papers will be so appended.

(*e*) If a special plea is made, and upon any challenge or motion, the record will set out in full the proceedings had thereon, including all testimony taken thereon and statements made relative thereto, as well as the disposition thereof made by the court.

(*f*) Evidence of previous convictions, if any, will not be appended to the record, but will be returned by the trial judge advocate with the record of trial to the appointing authority.

(*g*) If the findings and sentence or acquittal are announced in open court no certificate that the trial judge advocate recorded typewritten findings or sentence is required.

(*h*) The record will, at the end, contain sufficient space for the action of the reviewing authority. If necessary for this purpose, an extra sheet will be included.

359. Number of Copies.—One copy only of the record will be prepared, except in cases where the testimony is ordered recorded, when a carbon copy will be prepared for, and delivered to, the accused, upon his request, in the same manner prescribed in the case of a general court-martial. (See pars. 117 and 357 (b) 3, supra, and 366 (b), infra.)

360. Not Indexed—Exceptions.—The record will not be indexed, except in cases where the testimony is ordered recorded, when it will be indexed in the same manner as the record of a general court-martial. (See par. 357 (b) 2, supra.)

360a. The testimony will ordinarily be ordered recorded, and the employment of a reporter authorized, in cases where the seriousness of the charges, or other circumstances, such as the liability of the accused to be deprived of a valuable military status, warrant it in the opinion of the appointing authority.

361. BRIEFED.—The record will be briefed as prescribed for the record of a general court-martial.

362. BOUND.—The record will be securely bound. The method of binding is not prescribed, but it must be such as will securely fasten together all the leaves and parts that comprise the record. Easily removable clips or paper fasteners will not be used for this purpose.

SECTION III.

SUMMARY COURTS-MARTIAL.

363. FORM AND SUBSTANCE.—The requirements in respect of the form and substance of records of trial by summary court are indicated in the form for record of trial by summary court. (See Appendix 12, infra.) Except as otherwise required by Paragraphs 215 and 351 (d) and (f), supra, and by the note to Paragraph 43, supra, or indicated by the form of record of trial in Appendix 12, the pleas, findings and sentence or acquittal only are required to be recorded and subscribed by the summary court as such. The action of the commanding officer on the record, with date and his signature, completes the record.

SECTION IV.

CORRECTION OF RECORDS OF TRIAL.

364. RECORDS OF GENERAL OR SPECIAL COURTS-MARTIAL.—A record of trial by general or special court-martial, which by reason of omission, error, or other defect is substantially incomplete or incorrect, or which in the opinion of the appointing authority shows improper action by the court, may be returned by the appointing authority to the president of the court (but see A. W. 40, and par. 352, supra), directing that the court be reconvened for such action as may be appropriate. In any such case the defective part of the record

will be left unchanged and without erasure or interlineation, and the record of proceedings in revision will show specifically, ordinarily by page and line, the part of the original record that is changed and the change made. (See par. 352, and Form for Revision of Record, Appendix 10, infra.)

365. Records of Summary Courts-Martial.—A record of trial by summary court which by reason of omission, error, or other defect, is substantially incomplete or incorrect, or which, in the opinion of the appointing authority, shows improper action by the court (but see A. W. 40, and par. 352, supra), may be returned by the appointing authority to the summary court for such action as may be appropriate. (See par. 353.)

Section V.

DISPOSITION OF RECORDS OF TRIAL.

366. By Trial Judge Advocate.—(*a*) *Original Record.*—The trial judge advocate of a court-martial shall, with such expedition as circumstances may permit, forward to the appointing authority, or to his successor in command, the original record of the proceedings of the court in the trial of each case. The record should be forwarded as an inclosure to a letter of transmittal from the trial judge advocate, returning to the appointing authority the charges and other papers referred to him, and forwarding at the same time the required copy of the reporter's voucher. The original record of the proceedings of a general court-martial appointed by the President will be sent by the trial judge advocate directly to the Judge Advocate General of the Army.

(*b*) *Carbon Copy.*—The trial judge advocate of a general court-martial, or of a special court-martial where the testimony has been ordered recorded, shall, if the accused so desires, deliver or cause to be delivered to the accused personally, the carbon copy, when one is prepared (see pars. 355a and 359, supra), of the record of his trial, after it has been corrected, completed, and certified as a true copy (except as to findings and sentence, in the exceptional cases where the same are not announced in open court); and except as to exhibits not copied; and will take, and forward to the convening authority with the

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record of trial, the receipt of the accused therefor; or, in case the accused declines to sign such receipt, the affidavit thereto of the person making such delivery, stating the time and place thereof, and that the accused personally declined to sign such receipt, will be so forwarded to the convening authority.

367. By Appointing Authority.—(*a*) *Records of Trial by General Courts-Martial.*—After having been acted upon by the officer appointing the court, or by the officer commanding for the time being, and by the confirming authority, if there be one, the record of each trial by general court-martial, with the decisions and orders of the appointing authority made thereon, and of the confirming authority, if any, will be transmitted direct to the Judge Advocate General of the Army, accompanied by the statement of service, if there be any, and by the receipt of the accused, if any, for a copy of the record, or affidavit, if any, of delivery of a copy to him, and one original counterpart of the charges; the report, if any, of the psychiatrist or medical officer under paragraph 76a, supra; the report of the medical board, if any; the summaries of the evidence on preliminary investigation, and the report of the investigating officer with all indorsements thereon, including forwarding indorsements of the commanding officer and of all intermediate commanders; the report of the staff judge advocate to the appointing authority, under A. W. 70, and the order of reference for trial; and also by the report or review of the staff judge advocate upon the record of trial under A. W. 46, and by five copies of the order, if there be any, promulgating the result of the trial.

(*b*) *Records of Trial by Special Courts-Martial.*—After having been acted upon by the officer appointing the court, or by the officer commanding for the time being, the record of each trial by special court-martial, accompanied by an order publishing the result of the trial, and by one original counterpart of the charges; the report of the investigating officer, with the summary of the evidence on the preliminary investigation; the report, if any, of the psychiatrist or medical officer; the report, if any, of any medical board and all indorsements and other accompanying papers; and the order of reference for trial; and, if any, the receipt of the accused for (or affidavit of delivery

to him of) a copy of the record, will be forwarded ordinarily without indorsement or letter of transmittal, to the officer exercising general court-martial jurisdiction over the command, there to be filed in the office of the staff judge advocate until the completion of the accused's sentence, whereupon it will be forwarded by the staff judge advocate direct to the Judge Advocate General for permanent file. (A. W. 36.)

(*c*) *Records of Trial by Summary Courts-Martial.*—The several records of trial by summary courts-martial within a command shall be filed together in the office of the commanding officer and shall constitute the summary-court record of the command.

(*d*) *Reports of Trial by Summary Courts-Martial.*—The report of trial by summary court (copy of record of trial) will, with the least practicable delay after action has been taken on the sentence, be completed and transmitted to the officer exercising general court-martial jurisdiction over the command, there to be filed in the office of the staff judge advocate until the statistical information in it required for the annual report of the staff judge advocate have been secured, when it may be destroyed. (A. W. 36.)

Section VI.

LOSS OF RECORDS OF TRIAL.

368. Action to be Taken.—When, prior to action by the reviewing authority, a record of trial by court-martial is lost or destroyed, a new record of trial in the case will, if practicable, be prepared and will become the record of trial in the case. Such new record will, however, only be prepared when the extant original notes or other sources are such as to enable the preparation of a complete and accurate record of the case. In any case of loss of a record of trial by court-martial the summary court, trial judge advocate, or other proper person will fully inform the appointing authority as to the facts and as to the action, if any, taken.

CHAPTER XVI.

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Section I.

ACTION ON THE PROCEEDINGS.

369. Reviewing Authority.—The term reviewing authority is employed to designate the officer whose province and duty it is to take action upon the proceedings of a court-martial after the same are terminated, and, when the record is transmitted to him for such action, to approve or disapprove the sentence. This officer is ordinarily the commander who has convened the court. In his absence, however, or where the command has been otherwise changed, his successor in command, or, in the language of A. W. 46, "the officer commanding for the time being" is invested (by that article) with the same authority to pass upon the proceedings and order the execution of the sentence in a case of conviction. (Digest, p. 554, XIV, A, 1.) The term "appointing authority" is sometimes employed to denote the reviewing authority, but the latter term is the more correct one.

370. Review by Staff Judge Advocate.—"Under such regulations as may be prescribed by the President, every record of trial by general court-martial or military commission received by a reviewing or confirming authority shall be referred by him, before he acts thereon, to his staff judge advocate or to the Judge Advocate General." (A. W. 46.) The staff judge advocate or one of his assistants will prepare a written review, or report, as circumstances may require, in each case of conviction by general court-martial or military commission. Such review or report is intended primarily to advise the reviewing or confirming authority as to the essential features of the case and as to the action that he should take thereon. Where the evidence in

support of each specification upon which the accused is convicted is clear and conclusive and there are no errors or irregularities which may be regarded as affecting the substantial rights of the accused or as invalidating the sentence in whole or in part, a review will not be required, but a report to that effect will be sufficient. When the evidence in support of a specification is weak or conflicting, or where the evidence for the defense tends to weaken the evidence for the prosecution or to disprove the allegations in the specification, a review will be prepared and all the material evidence relating to the specification will be weighed; and the reviewer will state his opinion, both as to the weight of evidence and any error or irregularity that may be involved, and as to whether or not the finding of guilty should be approved, together with his reasons for such opinion. Where the accused has been convicted, however, upon other specifications upon clear and conclusive evidence it is sufficient that the reviewer state that fact with reference to such specifications in the review.

The review will contain a statement of such errors as may have been committed to the prejudice of the accused in the course of the trial or in the preparation of the record, and all such irregularities as may have affected the validity of the proceedings or sentence. Each of such errors or irregularities will be carefully weighed in the review for the purpose of informing the reviewing authority whether he should or should not, in view of the provisions of the thirty-seventh article of war, hold the sentence invalid or direct a rehearing; and the reviewer will expressly state as to such errors or irregularities whether or not in his opinion the sentence or any part thereof should be held invalid or whether or not in his opinion a rehearing should be directed. When reference is made to any error the page of the record which discloses such error will be cited, and, when testimony is referred to, the name of the witness giving such testimony and the page on which the same is recorded will be cited.

The judge advocate making a report or review will begin the same by stating the place and dates at which the accused (stating his name and age) was tried, and the sentence that was adjudged, and will then set forth the charges and specifications,

either verbatim or in substance, as may be thought best, upon which the accused was convicted. After such remarks as may be necessary in view of the above paragraphs of this regulation the officer making the review or report will make specific recommendation as to the sentence, either (a) that the sentence be approved or disapproved in whole, or (b) that it be approved in part, or (c) that a rehearing be directed, giving his reasons for his recommendation in each case; and the report or review will conclude with a draft of the action to be taken by the reviewing authority which the officer making the report or review recommends. (See par. 339.) The report or review will be signed by the officer making the same. If signed by an assistant staff judge advocate, the staff judge advocate will indorse thereon either (a) his approval or (b) his disapproval, with his reasons therefor, and will incorporate in his indorsement of disapproval a draft of the action to be taken by the reviewing authority which he recommends.

The signed copy of the report or review will be transmitted with the record of trial to the Judge Advocate General.

The reviewing authority will state at the end of the record of trial in each case his decisions and orders.

NOTE 1.—The review or report is intended to supplement, not to replace, the personal interview which the reviewing authority has with the staff judge advocate or the assistant who studies the case. This interview should be had in all cases where the reviewing authority does not regard the review or report as giving all the information or advice required, or where he differs from the officer making the same as to any statement or recommendation.

NOTE 2.—The regulations in this Manual specifying the contents of a review or report will not preclude the reviewing authority from directing in any case that a more complete review or report be prepared than the regulation requires.

NOTE 3.—Should the reviewing authority after receiving the advice of his staff judge advocate still be in doubt as to the action that he may or should take upon the sentence he may transmit the record to the Judge Advocate General with request for advice either (a) as to the whole case, or (b) as to any particular matter involved in the case; and will so transmit it for advice on the whole case before acting on it, if there be no staff judge advocate or officer acting as such on duty with his command.

NOTE 4.—The duties herein defined for a staff judge advocate will be performed by the officer acting as such, if no judge advocate is on duty on the staff of the reviewing authority.

371. Sentence Not Effective Until Approved.—No sentence of a court-martial shall be carried into execution, or ordered executed, until the same shall have been approved by the reviewing authority as defined in paragraphs 369 and 374, and confirmed if confirmation be necessary (see par. 378, infra), and until, also, if it be a sentence of a general court-martial involving the penalty of death, dismissal not suspended, or any sentence (not based solely upon findings of guilty of all specifications and charges, all supported by pleas of guilty) involving dishonorable discharge not suspended, or confinement in a penitentiary, or requiring the approval or confirmation of the President under A. W. 46, 48, or 51, it shall have been examined and acted upon by the board of review and the Judge Advocate General as required by Article of War 50½.

Upon acquittal, or upon conviction where the sentence does not include confinement, the accused, if in confinement or arrest, shall be released from confinement or arrest as provided in paragraph 332a. The announcement of the result of trial in orders is not necessary to the validity of the sentence or acquittal. It is not necessary for the reviewing authority to approve the findings and proceedings.

372. Effect of Approval and Disapproval.—(a) While approval gives life and operation to a sentence, disapproval, on the other hand, nullifies it. A disapproval of the sentence of a court-martial by the reviewing authority is not a mere expression of disapprobation but is a final determinate act putting an end to the disapproved sentence (or findings) and rendering them entirely nugatory and inoperative; and the legal effect of a disapproval is the same whether or not the officer disapproving is authorized finally to confirm the sentence. But to be thus operative a disapproval should be expressed. The effect of the entire disapproval of a sentence is not merely to annul the same as such but also to prevent the accruing of any disability or forfeiture which would have been incidental upon an approval. (Digest, p. 563, XIV, E, 9, b, (1).)

(b) An acquittal is not a "sentence" within the meaning of the Articles of War, or of this Manual, and does not require approval or confirmation. It will not be either approved or

disapproved; but will merely be promulgated in a court-martial order.

The same rule applies to any finding of "not guilty" of any charge or specification.

(c) "No authority will disapprove or return for reconsideration either—

(a) An acquittal; or

(b) A finding of not guilty of any specification; or

(c) A finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of war; or

(d) The sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.

And no court-martial, in any proceedings on revision, shall reconsider its findings or sentence in any particular in which a return of the record of trial for such reconsideration is hereinbefore prohibited." (A. W. 40.)

373. Manner of Approval.—The approval of the sentence should properly be of a formal character. The article requires the sentence to be approved. A formal approval of the findings only does not meet the requirement of the article. The sentence should be approved by "the officer appointing the court," or the officer commanding for the time being, although—as in a case of a sentence of dismissal in time of peace—he may not be empowered finally to confirm and give effect to the sentence. His approval is required as showing that he does not, as he is authorized to do, disapprove. (Digest, p. 174, CIV, A, 1, and A, 2.)

374. The Officer Commanding for the Time Being.—The "officer commanding for the time being," indicated in A. W. 46, is an officer who has succeeded to the command of the officer who appointed the court; as where the latter has been regularly relieved and another officer assigned to the command; or where the command of the appointing officer has been discontinued, and merged in a larger or other command, at some time before the proceedings of the court

are completed and required to be acted upon. Thus where, under these circumstances, a separate brigade has ceased to exist as a distinctive organization and been merged in a division, or a division has been similarly merged in an army or department, the commander of the division in the one case and of the army or department in the other, is "the officer commanding for the time being," in the sense of the article. So, where a court was convened by a division commander, but before the reviewing authority had acted upon the sentence the division was discontinued and the organizations composing it were distributed among the divisions of another corps, it was held that the commander of this other corps was the officer "commanding for the time being." So, where, before the proceedings of a special court convened by a post commander were completed, the post command had ceased to exist and the command became distributed in the department, it was held that the department commander, as the legal successor of the post commander, was the proper authority to approve the sentence. (Digest, p. 174, CIV, C, 1; p. 175, CIV, C, 2, and see C, 4.)

375. Action Where Accused Is Transferred to Another Department.—Where an accused who has been tried by general court-martial proceeds with his command, from the division, army, or force, or corps or army area or department or other general court-martial jurisdiction in which he has been tried to another division, army, or force, or corps or army area or department, or other general court-martial jurisdiction, before action has been taken on his case by the reviewing authority, the commanding general of the division, army, or force, or corps or army area, or department or other general court-martial jurisdiction in which he has been tried, is the proper reviewing authority of the case. (Digest, p. 554, XIV, A, 3.)

376. Reviewing Authority Must Act in Person.—The reviewing authority can not delegate to an inferior or other officer his function as reviewing authority as conferred by the forty-sixth article of war; nor can he authorize a staff or other officer to subscribe for him his decision and orders on the proceedings. He will sign in his own hand the action

taken by him on the proceedings, his rank and the fact that he is the commanding officer appearing after his signature.

376a. Error—Effect of Article of War 37.—"The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved, in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused: Provided, That the act or omission upon which the accused has been tried constitutes an offense denounced and made punishable by one or more of these articles." (A. W. 37.)

The thirty-seventh article of war vests a sound legal discretion in the reviewing authority to the end that substantial justice may be done. It directs him to disregard the improper admission or rejection of evidence or errors in pleading or procedure, unless such erroneous action by the court appears to him to have operated to the substantial injury of the accused. The effect of the erroneous action of the court should be weighed by him in the light of all the facts as shown by the record, and, if it appears to him that the court was materially influenced in its finding or sentence by its erroneous action, he should disapprove the findings and sentence, in whole or in part, as circumstances may require. The review by the staff judge advocate will be especially thorough as to the effect, in his opinion, of any error which the court may have made to the prejudice of the accused.

377. Powers Incident to Power to Approve.—The power to approve the sentence of a court-martial shall be held to include:

(*a*) The power to approve or disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to approve, the evidence of record requires a finding of only the lesser degree of guilt.

The authority here conferred to approve only so much of a finding of guilty as involves a finding of guilty of a lesser included offense is coextensive with the power of

courts-martial to convict of lesser included offenses. The more frequent occasions for the exercise of this authority are indicated below.

(1) Affray.
  (*a*) Assault.
  (*b*) Breach of peace (disorder).
(2) Assault with intent to commit murder.
  (*a*) Any of the minor degrees of assault.
(3) Battery.
  (*a*) Assault.
(4) Murder.
  (*a*) Manslaughter.
    Voluntary.
    Involuntary.
  (*b*) Attempt to commit.
  (*c*) Felonious assault.
  (*d*) Assault and battery.
  (e) Assault, bodily harm.
(5) Mayhem.
  (*a*) Assault with intent to commit.
  (*b*) Assault and battery.
  (c) Assault, bodily harm.
(6) Rape.
  (*a*) Assault with intent to commit rape.
  (*b*) Assault and battery.
  (*c*) Assault.
(7) Robbery.
  (*a*) Assault with intent to rob.
  (*b*) Larceny from the person.
  (*c*) Assault and battery.
  (*d*) Assault.
(8) Desertion.
  (*a*) Attempt to desert.
  (*b*) Absence without leave.
(9) Willful disobedience of superior officer.
  (*a*) Failure to obey.
(10) Willful disobedience of noncommissioned officer.
  (*a*) Failure to obey.

(11) Refusal to receive and keep prisoners.
(*a*) Failure to receive and keep.
(12) Quitting post to plunder or pillage.
(*a*) Quitting post.
(13) Drunk on duty.
(*a*) Drunk.
(14) Conduct unbecoming an officer and gentleman.
(*a*) Conduct to the prejudice of good order and military discipline.

(*b*) The power to approve or disapprove the whole or any part of the sentence.

(c) The power to remand a case for rehearing, under the provisions of A. W. 50½. (See par. 377a, infra.)

NOTE.—The reviewing authority (A. W. 47) may approve, or the confirming authority (A. W. 49) may confirm, so much of a finding of guilty as involves an attempt to commit the offense alleged.

377a. Rehearing.—"When the President or any reviewing or confirming authority disapproves or vacates a sentence, the execution of which has not theretofore been duly ordered, he may authorize or direct a rehearing. Such rehearing shall take place before a court composed of officers not members of the court which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court, and no sentence in excess of, or more severe than, the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceedings." (A. W. 50½.)

When a rehearing is directed the record of the former proceedings and the other papers mentioned in paragraphs 77b and 79b, supra, will be referred with the charges to the trial judge advocate, who will permit the defense counsel and other counsel for the accused to examine them equally with himself. No member of the court which rehears the case should be permitted to examine such record, or other documents (other than the charges), except if and when (if at all) received in evidence at the rehearing in accordance with law or some provision of this Manual.

If a witness at the former hearing is dead, or too old or infirm to attend at the rehearing, or resides, or is stationed, more than 100 miles from the place where the rehearing is had, or can not be found, his testimony at the former hearing, or any part of such testimony, will, in cases not capital, be admissible in evidence at the rehearing, subject, however, to the same objections as it would be were the witness present and testifying at the rehearing; provided, that in capital cases also, on motion of the accused or his counsel, the testimony at the former hearing of a witness thus absent may be so received in evidence at the rehearing, and when, in a capital case, a part of the testimony of a witness thus absent is received in evidence on motion of the accused or his counsel, the remainder of the testimony of such witness will thereby be rendered admissible in evidence subject to objections as aforesaid.

But when a rehearing is ordered because of an error in the admission or rejection of the testimony of a witness, or other error in his examination, his testimony given at the former hearing should not be received in evidence at the rehearing if it is reasonably practicable for him to appear as a witness before the court. In the event that his testimony at the former hearing is received, extreme care must be taken by the trial judge advocate that the errors made at the former hearing be not repeated. To that end, the reviewing authority will in all cases refer to the trial judge advocate with the record of the former hearing, a copy of the holding of the board of review or the review by the staff judge advocate or such other opinion or holding as may inform the trial judge advocate of the errors made at the former hearing which necessitated a rehearing. The papers thus referred to the trial judge advocate will be accessible to the defense counsel and any other counsel for the accused, and such parts thereof as relate to the errors committed at the former hearing may be examined by the law member when necessary to enable him to decide upon the admissibility of testimony or other questions of law involved; and may be read to the court when necessary for the court to decide such questions under the provisions of A. W. 31.

When a rehearing is directed neither the action of the court at the former proceeding nor the action of the reviewing or

confirming authority thereon will be published in orders, but the general court-martial order promulgating the final action in the case will in a separate paragraph publish such charges and specifications at the former hearing as may not have been referred for rehearing, together with the action of the court and reviewing authority thereon. The record of the former hearing will be forwarded to the Judge Advocate General with the record of the rehearing.

NOTE 1.—These regulations authorizing the receipt of testimony given at a former hearing to be received at a rehearing shall not be construed as preventing the calling of the witness to testify in person, or the taking of his deposition, either in lieu of or in addition to his testimony at the former hearing.

NOTE 2.—A rehearing may be directed either before a new court especially convened for that purpose, or before some other court already in existence, or before members of the original court who did not sit on the prior hearing. Ordinarily it will be preferable to detail the same trial judge advocate and defense counsel who served as such at the former hearing, if they are available, because of their familiarity with the case.

378. CONFIRMATION OF SENTENCES.—In the following cases confirmation by the President is required before the sentence of a court-martial is carried into execution:

(*a*) Any sentence respecting a general officer.

(*b*) Any sentence extending to the dismissal of an officer except that in time of war a sentence extending to the dismissal of an officer below the grade of a brigadier general may be carried into execution upon confirmation by the commanding general of the Army in the field or by the commanding general of the territorial department or division.

(*c*) Any sentence extending to the suspension or dismissal of a cadet, and

(*d*) Any sentence of death, except in the cases of persons convicted in time of war of murder, rape, mutiny, desertion, or as spies, and in such excepted cases a sentence of death may be carried into execution subject to the provisions of Article of War 50½, upon confirmation of the commanding general of the Army in the field or by the commanding general of the territorial department or division.

When the authority competent to confirm the sentence has already acted as the approving authority no additional confirmation by him is necessary. (A. W. 48.)

NOTE 1.—The power of confirmation of certain sentences in time of war, conferred by A. W. 48 upon the commanding general "of the territorial department or division", can not be exercised by the commanding general of a corps area or Army area.

NOTE 2.—For statement by whom a sentence of dismissal from service or dishonorable discharge imposed by National Guard courts-martial, not in the service of the United States, must be approved before its execution, see section 107, act of June 3, 1916, 39 Stat. 166, Appendix 2, infra.

379. POWERS INCIDENT TO POWER TO CONFIRM.—The power to confirm the sentence of a court-martial shall be held to include—

(*a*) The power to confirm or disapprove a finding, and to confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to confirm, the evidence of record requires a finding of only the lesser degree of guilt;

(*b*) The power to confirm or disapprove the whole or any part of the sentence; and

(c) The power to remand a case for rehearing, under the provisions of Article of War 50½. (A. W. 49.) (See par. 377a, supra.)

The manner of the exercise of the power conferred upon confirming authorities is indicated in the remarks in paragraph 377 and the subparagraphs thereunder, relating to the powers incident to the power to approve a sentence as provided for under A. W. 47.

380. MITIGATION OF PUNISHMENT—DEFINITION.—By mitigating a punishment is meant a reduction in quantity or quality, the general nature of the punishment remaining the same. (Digest, p. 177, CXII, B.)

381. MITIGATION OR REMISSION OF SENTENCES.—The power to order the execution of the sentence adjudged by a court-martial shall be held to include, inter alia, the power to mitigate or remit the whole or any part of the sentence. Any unexecuted portion of a sentence adjudged by a court-martial may be mitigated or remitted by the military

authority competent to appoint, for the command, exclusive of penitentiaries and the United States Disciplinary Barracks, in which the person under sentence is held, a court of the kind that imposed the sentence, and the same power may be exercised by superior military authority; but no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority, and no approved sentence of loss of files by an officer shall be remitted or mitigated by any authority inferior to the President, except as provided in the fifty-second article of war.

When empowered by the President so to do, the commanding general of the Army in the field, or the commanding general of the territorial department or division, may approve or confirm and commute (but not approve or confirm without commuting), mitigate, or remit, and then order executed as commuted, mitigated, or remitted, any sentence which under the Articles of War requires the confirmation of the President before the same may be executed.

The power of remission or mitigation extends to all uncollected forfeitures adjudged by sentence of court-martial. (A. W. 50.)

382. Mitigation When Permissible.—A sentence providing for dishonorable discharge only can not be mitigated; although it may be commuted by the President. Subject to the limitations expressed in the Executive order prescribing maximum limits of punishment, forfeiture of pay adjudged by a court-martial may be mitigated to detention of pay for a like period, or less, and confinement at hard labor may be mitigated to hard labor without confinement for a like period, or less. A sentence of dishonorable discharge, forfeiture of all pay and allowances due and to become due, and confinement at hard labor for a definite period may be mitigated to a lesser punishment, for example, to confinement at hard labor and a forfeiture of a specified portion, for example, two-thirds of the soldiers' pay per month for a period not exceeding that prescribed in the sentence, or to hard labor without confinement for a definite period not exceeding the period prescribed in the sentence, and forfeiture of any portion not exceeding two-thirds of the soldier's pay per month for a period not exceeding that prescribed in the sentence.

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383. Effect of Remission at Time of Approval.—The action of a reviewing authority in approving a sentence and simultaneously remitting a portion thereof is legally equivalent to approving only the sentence as reduced. (Bul. 12, p. 5, War Dept., 1912.)

384. Commutation of Sentences.—The power to commute sentences imposed by military tribunals, not being vested in military commanders, can be exercised by the President alone, except when the President has empowered a commanding general of the Army in the field or the commanding general of the territorial department or division so to do under A. W. 50 in certain cases. (See par. 382.)

385. Adding to Sentences.—Neither the reviewing authority nor any other officer is authorized to add to the punishment imposed by a court-martial. Where post orders classify all soldiers at a post according to their conduct, and provide that soldiers undergoing sentence of a court-martial will be denied pass privileges until the sentence is completed, such a provision adds to the punishment and is unlawful. (Bul. 46, p. 7, War Dept., 1914.)

386. Sentences in Excess of Legal Limit.—Where a sentence in excess of the legal limit is divisible, such part as is legal may be approved and executed. (Digest, p. 564, XIV, E, 9 c.) Thus: When a sentence to confinement, hard labor without confinement, forfeiture, or detention of pay is in excess of the legal limit, the part within the limit is legal and may be executed.

387. Action on Sentence May be Modified Before Publication.—Action taken by a reviewing officer upon the proceedings and sentence of a court-martial may be recalled and modified before it has been published and the party to be affected has been duly notified of the same. After such notice the action is beyond recall. An approval can not then be substituted for a disapproval or vice versa. (Digest, p. 565, XIV, E, 9 e.)

388. Where Conviction of Desertion Is Disapproved, Grounds to be Stated.—Where the reviewing authority disapproves a sentence for desertion he should indicate in his review whether his disapproval is based upon his belief that the evidence does not show an intent to desert, or is for

some other reason that assumes the accused was guilty as charged. The reason for so indicating the grounds of his disapproval is to enable the Finance Department to decide whether the pay and allowances due at date of alleged desertion should be forfeited and whether the reward paid for apprehending the deserter and the expenses incurred by the Government in transporting him from point of apprehension, delivery, or surrender to the station of his company or detachment or to the place of trial, including the cost of transportation of the guard, should be set against the alleged deserter's pay, under A. R. 127, 1913. (12 Comp. Dec. 328; 15 idem., 661.)

389. Place of Confinement—Change of.—The authority which has designated the place of confinement or higher authority may change the place of confinement of any prisoner under the jurisdiction of such authority; but when a military prison or post has been designated as the place of confinement of a prisoner under sentence, no power is competent to increase the punishment by designating a penitentiary as the place of confinement.

390. Loss of Files.—Where a court-martial convened by a corps area commander or other officer exercising general court-martial jurisdiction, for the trial of an officer sentences the accused to the punishment of a loss of files, the approval of the appointing authority is sufficient to give full effect to the sentence, and no action by superior authority can add anything to its effect or conclusiveness. Confirmation by the President is not essential to the execution of such a sentence; and the fact that the same involves a change in the Army Register does not make requisite or proper a revision of the case by the War Department, except as provided by A. W. 50½. The corps area, or other commander, however, can not restore the files; such action can be taken only by the President. (See A. W. 50.)

391. Suspension of Sentences until Pleasure of President be Known.—Any officer who has authority to carry into execution the sentence of death, or of dismissal of an officer, may suspend the same until the pleasure of the President shall be known; and in such case, he shall immediately

transmit to the President a copy of the order of suspension, together with a copy of the proceedings of the court. (A. W. 51.)

392. Suspension of Sentences.—The authority competent to order the execution of the sentence of a court-martial may, at the time of the approval of such sentence, suspend the execution, in whole or in part, of any such sentence as does not extend to death, and may restore the person under sentence to duty during such suspension; and the Secretary of War or the commanding officer holding general court-martial jurisdiction over any such offender may, at any time thereafter, while the sentence is being served, suspend the execution, in whole or in part, of the balance of such sentence and restore the person under sentence to duty during such suspension. A sentence, or any part thereof, which has been so suspended may be remitted, in whole or in part, except in cases of persons confined in the United States Disciplinary Barracks or its branches, by the officer who suspended the same, by his successor in office, or by any officer exercising appropriate court-martial jurisdiction over the command in which the person under sentence may be serving at the time, and, subject to the foregoing exceptions, the same authority may vacate the order of suspension at any time and order the execution of the sentence or the suspended part thereof in so far as the same shall not have been previously remitted, subject to like power of suspension. The death or honorable discharge of a person under suspended sentence shall operate as a complete remission of any unexecuted or unremitted part of such sentence. (A. W. 52.)

393. Execution or Remission—Confinement in Disciplinary Barracks.—When a sentence of dishonorable discharge has been suspended until the soldier's release from confinement, the execution or remission of any part of his sentence shall, if the soldier be confined in the United States Disciplinary Barracks or any branch thereof, be directed by the Secretary of War. (A. W. 53.) (See Ch. X, Army appropriation act of July 9, 1918; 40 Stat., 883.)

A. W. 52 and 53 embody in court-martial practice the modern principle of the suspended sentence. This principle

is of peculiar significance in Army administration in time of war, since it not only enables the reviewing authority to extend to soldiers an opportunity to redeem themselves but also serves to save for the Army the highest possible percentage of the man power of the Nation.

394. PLACE OF CONFINEMENT TO BE DESIGNATED BY REVIEWING AUTHORITY.—When the sentence of a general court-martial prescribes dishonorable discharge and confinement, so much of the sentence as relates to confinement will be expressed in substantially the following form:

To be confined at hard labor at such place as the reviewing authority may direct for ——— [leaving to the reviewing authority the designation of the place of confinement].

395. FORMS FOR ACTION ON SENTENCE BY REVIEWING AUTHORITY.—(See Appendix 15.)

396. WHEN CONFINEMENT IN A PENITENTIARY MAY BE DIRECTED.—Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall under the sentence of a court-martial be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia, or by way of commutation of a death sentence, and unless, also, the period of confinement authorized and adjudged by such court-martial is more than one year: *Provided*, That when a sentence of confinement is adjudged by a court-martial upon conviction of two or more acts or omissions any one of which is punishable under these articles by confinement in a penitentiary, the entire sentence of confinement may be executed in a penitentiary: *Provided further*, That penitentiary confinement hereby authorized may be served in any penitentiary directly or indirectly under the jurisdiction of the United States: *Provided further*, That persons sentenced to dishonorable discharge and to confinement not in a penitentiary shall be confined in the United States Disciplinary Barracks or elsewhere as the

Secretary of War or the reviewing authority may direct, but not in a penitentiary. (A. W. 42.)

NOTE.—For a full statement of the law relating to penitentiary confinement, the War Department policy with reference to the segregation of general prisoners convicted of offenses punishable with penitentiary confinement and requirements placed upon appointing authorities in stating the law applicable where such confinement is directed, see Chapter XIII, Section II, paragraphs 337, 339, and 341.

397. WHEN CONFINEMENT IN DISCIPLINARY BARRACKS WILL BE DIRECTED.—The United States Disciplinary Barracks at Fort Leavenworth, Kans., or one of its branches will be designated as the place of confinement of all general prisoners other than residents of Porto Rico, the Canal Zone, Hawaiian Islands, or the Philippine Islands who are to be confined for six months or more and who are not to be confined in a penitentiary pursuant to the preceding paragraph. From time to time detailed instructions will be issued as to which of the barracks shall be designated and as to when the prisoners shall be transferred to them.

398. WHEN CONFINEMENT IN POST WILL BE DIRECTED.—A military post, station, or camp will be designated as the place of confinement of any general prisoner whose case does not come within the terms of paragraphs 396 and 397 of this section.

399. COOPERATION OF REVIEWING AUTHORITIES.—The successful segregation of general prisoners according to the grade of their offense as prescribed by the three preceding paragraphs must depend to a considerable extent upon the cooperation of officers exercising general court-martial jurisdiction. The demand for prison labor at posts is not deemed a sufficient reason for a departure from the rule of segregation prescribed.

SECTION II.

APPELLATE REVIEW.

399a. Review of General Court-Martial Cases under Article of War 50½.—(a) Sentences not effective until acted upon by Board of Review and Judge Advocate General.—No sentence requiring approval or confirmation by the President under the provisions of Article of War 46, 48, or 51, and, except as hereinafter provided, no other sentence, which, as approved or con-

firmed by the authority having power to direct its execution, involves the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, shall be carried into execution or ordered executed unless and until the record of trial has been acted upon by the Board of Review and the Judge Advocate General, as provided in Article of War 50½; except that the proper reviewing or confirming authority may, upon his approval or confirmation of a sentence involving dishonorable discharge or confinement in a penitentiary, order its execution if it be based solely upon findings of guilty all supported by pleas of guilty.

(b) Cases requiring approval or confirmation by the President under Articles of War 46, 48, and 51.—In every case in which a sentence requires approval or confirmation by the President under the provisions of Article of War 46, 48, or 51, the record of trial, transmitted with the other papers in the case as provided in paragraphs 366 and 367, supra, will be examined by the Board of Review. The opinion of the Board of Review will be submitted in writing to the Judge Advocate General, who will transmit the record and the Board's opinion, with his recommendations, directly to the Secretary of War for the action of the President as reviewing or confirming authority as the case may be. (See pars. 377 and 379, supra.)

(c) Death, dismissal, dishonorable discharge, and penitentiary cases not included in subparagraph (b).—In every case, not included in the provisions of the preceding subparagraph (b), in which a sentence, as approved or confirmed by the authority having power to direct its execution, involves the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, such authority, in entering in the record of trial his action thereon approving or confirming such sentence, in whole or in part, will, except as hereinafter provided, withhold the order of execution until after the Board of Review and the Judge Advocate General shall have passed upon the legal sufficiency of the record to support the sentence as thus approved or confirmed; except that such authority may, upon his approval or confirmation of a sentence involving dishonorable discharge or confinement in a penitentiary, order its execution if it be based solely

upon findings of guilty all supported by pleas of guilty. Such action approving or confirming the sentence in whole or in part and withholding the order of execution will be entered in the record of trial in substantially the following form, the necessary changes being made to conform the action to the facts of each particular case:

Headquarters ———————————
(Place)———————————
(Date) ———————————

In the foregoing case of ——— ——— the sentence is approved (or confirmed), (but the period of confinement is reduced to ———). The ——— is designated as the place of confinement. Pursuant to the provisions of Article of War 50½ applying to this case, the execution of the sentence will not be ordered until the Board of Review and the Judge Advocate General shall have passed upon the legal sufficiency of the record to support the sentence.

(Signature)———————————
(Rank)———————————
Commanding.

The record of trial will thereupon be transmitted with the other papers in the case, as provided in paragraph 367, supra, directly to the Judge Advocate General.

Should the Board of Review, with the approval of the Judge Advocate General, hold the record of trial legally sufficient to support the findings and sentence, as approved or confirmed, the Judge Advocate General will so advise the reviewing or confirming authority from whom the record was received, who may thereupon order the execution of such sentence (with such mitigation, remission, suspension, or commutation, if any, as he may have theretofore directed or may then direct under A. W. 47, 49, 50, or 52), and will publish the general court-martial order. (See par. 400, infra.)

Should the Board of Review, with the concurrence of the Judge Advocate General, hold the record of trial legally insufficient to support the findings or sentence in whole or in part, or that errors of law have been committed injuriously affecting the substantial rights of the accused, the Judge Advocate General will so advise the convening authority to whom the record shall be transmitted through the proper channels for vacation of such findings and sentence in whole or in part by such convening

authority in accord with such holding and the recommendations of the Judge Advocate General thereon, and for a rehearing (see par. 379½) or such other action as may be proper; and such authority will, unless he directs a rehearing, publish the general court-martial order (see par. 400, infra).

Should the Judge Advocate General not concur in the holding of the Board of Review, he will forward the record of trial and all other papers in the case, including the opinion of the Board of Review and his own dissent therefrom, directly to the Secretary of War for the action of the President, who may confirm the action of the reviewing authority or confirming authority below, in whole or in part, with or without remission, mitigation, or commutation, or may disapprove, in whole or in part, any finding of guilty, and may disapprove or vacate the sentence, in whole or in part (A. W. 50½), and will order accordingly; and, in the event the President shall disapprove the sentence, he may authorize or direct a rehearing in accordance with the provisions of Article of War 50½. (See pars. 377 (c) and 379 (c), supra.)

After such action of the President shall have been taken, the record of trial, together with such action, will be returned to the Judge Advocate General, who will, unless a rehearing has been authorized or directed by the President, notify the reviewing or confirming authority of the President's action, and the reviewing or confirming authority will thereupon promulgate the action of the President, and direct execution accordingly. If the President authorizes or directs a rehearing, the Judge Advocate General will also transmit the record of trial to the reviewing or confirming authority for his further proper action in accordance with the action of the President.

(d) All other cases.—Every record of trial by general court-martial, examination of which by the Board of Review is not in this paragraph hereinbefore provided for, shall be examined in the Judge Advocate General's office and, if found legally insufficient to support the findings of guilty and the sentence, in whole or in part, shall be examined by the Board of Review. The Board of Review, if it also finds that such record is legally insufficient to support the findings of guilty and the sentence, in whole or in part, shall submit its opinion in writing to the Judge Advocate General, who shall transmit the record and the Board's opinion,

with his recommendations, directly to the Secretary of War, for the action of the President. In any such case the President may approve, disapprove, or vacate, in whole or in part, any findings of guilty, or confirm, mitigate, commute, remit, or vacate any sentence in whole or in part, and direct the execution of the sentence as confirmed or modified; and he may restore the accused to all rights affected by the findings and sentence or part thereof held by him to be invalid; and the President's necessary orders to this end shall be binding upon all departments and officers of the government (A. W. 50½).

NOTE.—Article of War 50½ provides that the Judge Advocate General shall constitute in his office a Board of Review consisting of not less than three officers of the Judge Advocate General's Department; that, whenever necessary, the Judge Advocate General may constitute two or more Boards of Review in his office, with equal powers and duties; that the President, whenever he deems such action necessary, may direct the Judge Advocate General to establish a branch of his office, under an assistant Judge Advocate General, with any distant command, and to establish in such branch office a Board of Review or more than one; and that such assistant Judge Advocate General and such Board or Boards of Review in a branch office shall be empowered to perform for that command, under the general supervision of the Judge Advocate General, the duties which the Judge Advocate General and the Board or Boards of Review in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval or confirmation by the President. The words "Board of Review" and "Judge Advocate General" as used in this Manual will be deemed to refer, respectively, to a Board of Review established in a branch of the office of the Judge Advocate General and to an Assistant Judge Advocate General, in cases within a command where such branch office is established, except cases requiring approval or confirmation by the President.

NOTE 1.—In all cases in which the order of execution is withheld under any of the provisions of Article of War 50½, the staff judge advocate, before transmitting the record of trial to the Judge Advocate General, will take therefrom the data necessary for drafting a general court-martial order.

NOTE 2.—When under the provisions of A. W. 50½ the Judge Advocate General advises the reviewing or confirming authority of the holding of the Board of Review, and his concurrence therein, he may in a separate communication, for reasons stated therein, advise such reviewing or confirming authority (1) that he deems the sentence unnecessarily severe, or (2) that in his opinion one or more of the findings of guilty should be disapproved.

400. COURT-MARTIAL ORDERS.—Trials by general courts-martial, including so much of the proceedings as will give the charges and specifications, the pleas, findings, and sentence, or acquittal, and the action of the reviewing authority, and of the confirming authority, if any, and also of the Board of Review and the Judge Advocate General, in cases requiring their action under A. W. 50½, and of the President if his action thereon be required by A. W. 48, 50½, or 51, will be announced in general court-martial orders issued from the War Department or from other headquarters exercising general court-martial jurisdiction. If the charges contain matter which for any reason is unfit for publication, such matter will be omitted from the order, but, in case of final conviction, a copy thereof will be promptly furnished by the reviewing authority to the commanding officer of the post at which the accused is stationed (or, if in arrest or confinement, at which he is being so held in arrest or confinement), to be included with the papers required to be sent to the commanding officer of the post or other place where the sentence is to be executed. Trials by special courts-martial will also be published in orders similar in form to general court-martial orders. (For forms, see Appendix 11.)

A copy of the special court-martial order will be forwarded to The Adjutant General of the Army by the adjutant of the command with the memorandum of transmittal of report of changes for the day upon which the order is published, for file with the record of the accused.

SECTION III.

ACTION AFTER PROMULGATION OF SENTENCE.

401. DATE OF BEGINNING OF SENTENCE.—(*a*) The order promulgating the proceedings of the court will be of the date that the reviewing or confirming authority takes final action on the case. The order of promulgation of a sentence of confinement ordered to be executed will state the date upon which such sentence was announced in open court; or where, in exceptional cases, the same was not announced, the order will state the date upon which the sentence of confinement was adjudged by the court. Such date

will mark the beginning of the sentence of confinement, whether the accused had then been placed in confinement or not. A sentence of confinement, hard labor without confinement, restriction to limits, or deprivation of privileges, is continuous until the term expires, except where the person undergoing such sentence is absent without authority, or under a parole which proper authority has revoked, or is delivered to the civil authorities under A. W. 74. When the reviewing or confirming authority takes final action upon the case it is proper for him to consider any period of confinement served by the accused prior to and during the trial, and in a proper case to make it the basis of mitigation of the sentence.

(*b*) When soldiers, or other persons subject to military law, awaiting the result of trial or undergoing sentence, commit offenses for which they are tried, the second sentence will be executed upon the expiration of the first, except that when the first sentence does not involve confinement, and the second sentence does involve hard labor with confinement, the second sentence will take precedence. If a soldier, while awaiting the result of a trial that terminates in a sentence of confinement without dishonorable discharge, or while undergoing a sentence of confinement without dishonorable discharge, is tried for a further offense and sentenced to confinement without dishonorable discharge, the period of confinement imposed by the second sentence will be executed upon the expiration of the period of confinement imposed by the first; but if the second sentence imposed confinement with dishonorable discharge (whether or not the dishonorable discharge be suspended), the period of confinement on the first sentence will be regarded as having terminated upon the date the second sentence takes effect, leaving to be executed only the confinement imposed by the second sentence.

402. Applications for Clemency.—The power to remit or mitigate punishment imposed by a court-martial, vested in the authority who appointed the court or the corresponding authority under whose jurisdiction the sentence is being executed, extends only to unexecuted portions of a sentence. If the punishment be one imposed by a general court-martial, it may be remitted or mitigated only by an officer competent to

order a general court-martial and under whose jurisdiction the sentence is being executed, exclusive of penitentiaries and the United States Disciplinary Barracks, or any branch thereof, or by superior military authority. (A. W. 50, and see pars. 381–383, supra.) The fact that a soldier or other person subject to military law has been dishonorably discharged or dismissed through his sentence does not affect this power. An application for clemency in case of a prisoner sentenced to confinement in a penitentiary or in the United States Disciplinary Barracks or any branch thereof will be forwarded to The Adjutant General of the Army for the action of the Secretary of War and the President. A military prisoner sentenced to confinement in a penitentiary or in the United States Disciplinary Barracks or any branch thereof will, so far as concerns the exercise of clemency, be considered to have passed beyond the jurisdiction of the department or other commander from the date of the approval of his sentence.

NOTE.—For power to commute sentences, see paragraph 384, supra.

403. Remission of Suspended Sentence of Dishonorable Discharge.—Requests to remit the dishonorable discharge under a suspended sentence of dishonorable discharge are requests for clemency, and will be made to the authority empowered to extend clemency.

404. Clemency Applications Limited to One in Six Months.—It appearing that the expenditure of much unnecessary time and labor is involved in the reexamination in the War Department upon further applications for clemency of cases relating to military prisoners which have received recent and thorough consideration in connection with prior applications, the Secretary of War has directed that where such further application is received at the War Department within six months of such prior consideration the case will not be reexamined unless there be set forth in the application new and material reasons for the granting of clemency, but that the applicant will be advised of the recent consideration and of the action had thereon.

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SECTION I.

ENLISTMENT—MUSTER—RETURNS.

405. *Fifty-fourth Article of War:*

Any person who shall procure himself to be enlisted in the military service of the United States by means of willful misrepresentation or concealment as to his qualifications for enlistment, and shall receive pay or allowances under such enlistment, shall be punished as a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

A fraudulent enlistment is an enlistment procured by means of a willful misrepresentation in regard to a qualification or disqualification for enlistment, or by intentional concealment of a disqualification which has had the effect of causing the enlistment of a man not qualified to be a soldier and who but for such false representation or concealment would have been rejected.

Willful means intentional, thus excluding cases of mistake or forgetfulness.

Misrepresentation and concealment include any act, statement, or omission, however made, which has the effect of conveying an untruth or concealing the truth concerning the applicant's qualifications or disqualifications for enlistment.

The misrepresentation or concealment may be in matters which are designed to open the door to inquiry concerning the qualifications or disqualifications for enlistment, such as questions as to previous service, previous applications for enlistment, etc.

The qualifications or disqualifications may be prescribed by law, regulations, or orders.

Answers to questions having no bearing on the applicant's qualifications for enlistment, such as questions as to applicant's name, address, or immaterial statements as to age, are not sufficient.

ANALYSIS AND PROOF.

The article applies only to enlisted men.

The article defines one offense, i. e., fraudulent enlistment.

(*a*) The enlistment of the accused in the military service as alleged.

(*b*) That the accused willfully misrepresented a certain fact or facts regarding his qualifications or disqualifications for enlistment, or willfully—that is, intentionally—concealed a disqualification, as alleged.

(*c*) That enlistment was procured by such misrepresentation or concealment.

(*d*) That under such enlistment the accused received either pay or allowances, or both, as alleged.

(*e*) Where a soldier enlists without a discharge (see A. W. 28), the proof should include the fact that at the time of the alleged enlistment the accused was a soldier, and that the enlistment was entered into without a regular discharge from the former enlistment.

406. *Fifty-fifth Article of War:*

Any officer who knowingly enlists or musters into the military service any person whose enlistment or muster in is prohibited by law, regulations, or orders shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

See the terms of the article.

The prohibited enlistment must be knowingly made, i. e., it must be shown that the accused knew that the person enlisted or mustered in by him was within the prohibited class.

Knowingly includes not only a certainty of belief but also such a degree of belief as the ordinarily prudent man acts upon.

The enlistment or muster in of the person must be at the time prohibited by law or by regulations or orders that were operative as to the accused.

This excludes cases where the enlistment or muster in was prohibited by regulations or orders of the existence of which the accused was not aware or at the time chargeable with knowledge.

Analysis and Proof.

The article applies only to commissioned officers. While members of the Army Nurse Corps, warrant officers, Army field clerks, and field clerks Quartermaster Corps are officers, they are not commissioned officers, and hence, as the word "officer" used in this article is used in a penal statute, it must be construed strictly to mean a commissioned officer. Should any of the aforementioned persons subject to military law commit acts which if done by a commissioned officer would be an offense under this article, they should be charged under A. W. 96.

The article defines two offenses which may be treated under one heading, as follows:

1. Officer making unlawful enlistment (or muster in).

PROOF.

(*a*) The enlistment or muster in by the accused commissioned officer of the person named, as alleged.

(*b*) That such person was within the classes whose enlistment or muster in were prohibited at the time of such enlistment or muster in.

(*c*) That the accused knew this at the time of the enlistment or muster in of such person.

407. *Fifty-sixth Article of War.*

Any officer who knowingly makes a false muster of man or animal, or who signs or directs or allows the signing of any muster roll knowing the same to contain a false muster or false statement as to the absence or pay of an officer or soldier, or who wrongfully takes money or other consideration on mustering in a regiment, company, or other organization, or on signing muster rolls, or who knowingly musters as an officer or soldier a person who is not such officer or soldier, shall be dismissed from the service and suffer such other punishment as a court-martial may direct.

Definitions and Principles.

See the terms of the article for requirements as to muster rolls and definition of the offenses.

Muster has been defined as the assembling, inspecting, entering upon the formal rolls, and officially reporting as a component part of the command of persons or public animals. (Winthrop, p. 852.)

ANALYSIS AND PROOF.

The article applies only to commissioned officers. (See comments under A. W. 55.)

The article defines a number of offenses which may be treated under the following heads:

I. Making false muster.

II. Signing, directing, or allowing the signing of false muster rolls.

III. Taking money or other consideration on muster or signing muster rolls.

IV. Mustering as an officer or soldier one who is not.

I. MAKING FALSE MUSTER.

PROOF.

(*a*) That the muster of a certain man or animal was made by the accused officer, as alleged.

(*b*) That the muster was false as alleged.

(*c*) That the accused officer knew this at the time of making the muster.

II. SIGNING, DIRECTING, OR ALLOWING THE SIGNING OF FALSE MUSTER ROLLS.

PROOF.

(*a*) That the accused officer signed the muster roll or directed or allowed the signing of the muster roll as alleged.

(*b*) That such muster roll was false in certain particulars as alleged.

(*c*) That the accused officer knew this at the time he signed the roll or directed or allowed it to be signed as alleged.

III. TAKING MONEY OR OTHER CONSIDERATION ON MUSTER OR SIGNING MUSTER ROLLS.

PROOF.

(*a*) That the accused officer made the muster of the organization or signed the muster rolls as alleged.

(*b*) That he accepted money or other consideration as a compensation or reward for making the muster or signing the muster rolls.

(*c*) That the taking of such money or other consideration was wrongful—that is, without legal excuse.

IV. MUSTERING AS AN OFFICER OR SOLDIER ONE WHO IS NOT.

PROOF.

(*a*) That the accused officer mustered as an officer or soldier a certain person, as alleged.

(*b*) That the person so mustered was not such officer or soldier.

(*c*) That the accused knew this when he made the muster.

408. *Fifty-seventh Article of War:*

Every officer whose duty it is to render to the War Department or other superior authority a return of the state of the troops under his command, or of the arms, ammunition, clothing, funds, or other property thereunto belonging, who knowingly makes a false return thereof shall be dismissed from the service and suffer such other punishment as a court-martial may direct. And any officer who, through neglect or design, omits to render such return shall be punished as a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

See the terms of the article, the penal part of which applies broadly to "every officer whose duty it is to render to the War Department or other superior authority a return of the state of the troops under his command, or of the arms, ammunition, clothing, funds, or other property thereunto belonging."

ANALYSIS AND PROOF.

The article applies to commanding officers only.

The article defines two offenses:

I. Making false returns.

II. Omitting to render returns.

I. MAKING FALSE RETURNS.

As to knowingly, see remarks under fifty-fifth article. (Par. 406, supra.)

PROOF.

(*a*) That the accused officer was a commanding officer, as alleged.

(*b*) That it became his duty as such to render to a certain superior authority a certain return as specified.

(*c*) That he complied with such duty, and that the return so made was false in certain particulars, as alleged.

(*d*) That the accused officer knew that the return was false at the time of making it.

II. OMITTING TO RENDER RETURNS.

The term "neglect" involves the idea of culpability and includes the case of an officer who, knowing the return to be due, fails to render it through remissness or procrastination.

PROOF.

(*a*) That the accused officer was a commanding officer as alleged.

(*b*) That it became his duty as such to render to a certain superior authority a certain return as specified.

(*c*) That he omitted through neglect or design to render such return.

SECTION II.

DESERTION—ABSENCE WITHOUT LEAVE.

409. *Fifty-eighth Article of War:*

Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

Desertion is absence without leave accompanied by the intention, either (a) not to return, (b) to avoid hazardous duty, or (c) to shirk important service. (A. W. 28.)

A.—Absence Without Leave, with Intent Not to Return.

Both elements are essential to the offense. The offense becomes complete when the person absents himself without authority from his place of service with intent not to return thereto. A prompt repentance and return are no defense, nor is it a defense that the deserter at the time of departure intended to report for duty elsewhere. Thus, where a soldier leaves his post intending never to go back unless a certain event happens, or leaves his post with such intent and reports at another post, he is a deserter; but unless such intent exists at some time the soldier can not be a deserter whether his purpose is to stay away a definite or indefinite length of time.

Where a soldier, without having been discharged, again enlists in the Army or in the Militia in the service of the United States, such enlistment is, by the twenty-eighth article of war made sufficient evidence of desertion. In such a case, other proof of the intent permanently to stay away from his former place of service and of the status of absence without leave therefrom are unnecessary.

B.—Absence Without Leave, with Intent to Avoid Hazardous Duty.

C.—Absence Without Leave, with Intent to to Shirk Important Service.

"Short desertion."—Under the twenty-eighth article of war as amended by the code of 1920 any person subject to military law who "quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter." Congress thereby adopted the principle that willful absence from dangerous or hazardous duty is desertion, as it is in the British service ("short desertion"). Under this article a man who absents himself in a deliberate or clandestine manner, with a view of (1) avoiding some hazardous duty or (2) of shirking some important service, though he may intend to return when the evasion of the duty or the service is accomplished, is liable to be convicted of desertion, just as if an intention never to return had been proved against him.

(Brit. M. M. M., Chap. III, sec. 16, pp. 18–19). Thus, if a man on the eve of the embarkation of his regiment for overseas service, or when ordered to aid in the suppression of riot or insurrection, or on strike duty, conceals himself in barracks, or is absent without leave, the court may be quite justified in presuming an intention to escape the hazardous duty or important service on which he was ordered, and in convicting him of desertion.

ANALYSIS AND PROOF.

The article includes all persons subject to military law.
The article covers two offenses, as follows:
I. Desertion.
II. Attempting to desert.

I. DESERTION.

PROOF.

(*a*) That the accused absented himself, or remained absent without authority, from his place of service, as alleged.

(*b*) That, either,

1. He intended, at the time of absenting himself or at some time during his absence, to remain away permanently from such place: or,

2. That at the time he absented himself either the organization to which he belonged, or he himself, was under orders or anticipated orders involving either (a) hazardous duty or (b) some important service, and that his absence without leave was so timed as to appear calculated to enable him to avoid such hazardous duty or to shirk such important service, as the case may be.

(*c*) That his absence was of a duration and was terminated as alleged.

(*d*) That his act was done, if so alleged, in the execution of a certain conspiracy, or in the presence of a certain outbreak of Indians, or of a certain unlawful assemblage which his organization was opposing, or in time of war where the court will not take judicial notice of the existence of a status of war.

(*e*) Where the soldier enlisted without a discharge (see A. W. 28), that the accused was a soldier in a certain organization of the Army as alleged; and that, without being discharged from such organization, he again enlisted in the Army, or in the militia when in the service of the United States, or in the Navy, or the Marine Corps of the United States, or in some foreign army, as alleged. In this case proof of the absence without leave and of the intention not to return become unnecessary.

(f) When an officer, having tendered his resignation, and prior to due notice of the acceptance of the same, quits his post, etc. (see A. W. 28), that the accused was a commissioned officer of the Army as alleged; that he has tendered his resignation; and that, prior to due notice of acceptance thereof, he did quit his post or proper duties without leave; and that he did so with intent to absent himself permanently from his post or proper duties.

NOTE.—In proving a specification alleging that the accused quit his organization or place of duty with the intent to avoid hazardous duty, or with the intent to shirk important service, the trial judge advocate should offer in evidence proof of facts tending to show that the accused knew with reasonable certainty that he would be required for such hazardous duty or important service, as the case may be. To prove this the prosecution should show (a) that the accused was warned; or (b) that the organization, as a whole, was warned, if possible on parade at which the roll was called and the accused was present; or (c) that, having regard to the orders, or the usual customs of reliefs, the accused must have known that the turn of his company, etc., was imminent (an officer or senior noncommissioned officer should give evidence of the usual custom of reliefs, and of the dates of the hazardous duties or important service which the accused missed or which his absence was timed to miss); or (d) that the period of absence was so long that the accused must have known that he would miss hazardous duty or important service.

II. ATTEMPTING TO DESERT.

An attempt to desert is an overt act other than mere preparation toward accomplishing a purpose to desert.

Usually the endeavor of the accused toward getting away will be frustrated by an agency independent of his own will; but once the attempt is made a turning back by the accused

of his own accord does not obliterate the offense. An instance of the offense is: A soldier intending to desert hides himself in an empty freight car on the post, intending to effect his escape from the post by being taken out in the car.

PROOF.

(*a*) That the accused made the attempt by doing the overt act or acts alleged.

(*b*) That he intended to desert at the time of doing such act or acts.

(*c*) That his act was done, if so alleged, in the execution of a certain conspiracy, or in the presence of a certain outbreak of Indians, or a certain unlawful assemblage which his organization was opposing, or in time of war where the court will not take judicial notice of the existence of the status specified.

NOTE.—The attempt to desert may be with the intent either (a) not to return, (b) to avoid hazardous duty, or (c) to shirk important service. (See subpar. I of this paragraph, supra.) The proof should correspond to the allegations of the specification, as the case may be.

410. *Fifty-ninth Article of War:*

Any person subject to military law who advises or persuades or knowingly assists another to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

See the definition of desertion under the next preceding article.

As to knowingly, see remarks under the fifty-fifth article.

The offenses of persuading and assisting desertion are not complete unless the desertion occurs; but the offense of advising is complete when the advice is given, whether the person advised deserts or not.

It is not necessary that the accused act alone in giving the advice or assistance, or in the persuasion; and he may act through other persons in committing the offenses.

ANALYSIS AND PROOF.

The article applies to all persons subject to military law. See article 2.

The article defines three offenses, as follows:

I. Advising desertion.

II. Persuading desertion.

III. Assisting desertion.

I. ADVISING DESERTION.

PROOF.

(*a*) That the accused advised a person subject to military law to desert the service as alleged.

(*b*) That the act was done, if so alleged, in time of war, where the court will not take judicial notice of the status of war.

II. PERSUADING DESERTION.

PROOF.

(*a*) That the accused used persuasion to induce a person subject to military law to desert the service as alleged.

(*b*) That the person whom he persuaded deserted as alleged, and was induced to do so by such persuasion. See proof of desertion in the next preceding article.

(*c*) That the act was done, if so alleged, in time of war, where the court will not take judicial notice of the status of war.

III. ASSISTING DESERTION.

PROOF.

(*a*) That the accused knowingly assisted a person subject to military law to desert the service as alleged.

(*b*) That the person given such assistance deserted as alleged. See proof of desertion in the next preceding article.

(*c*) That the act was done, if so alleged, in time of war, where the court will not take judicial notice of the status of war.

411. *Sixtieth Article of War:*

Any officer who, after having discovered that a soldier in his command is a deserter from the military or naval service or from the Marine Corps, retains such deserter in his command without informing superior authority or the commander of the organization to which the deserter belongs, shall be punished as a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

See definition of desertion under article 58.

Discovered does not imply a certainty on the one hand or a mere suspicion on the other. It implies such a belief as the ordinarily prudent officer would act upon.

ANALYSIS AND PROOF.

The article applies only to commanding officers.

The article defines one offense:

I. RETAINING A DESERTER.

PROOF.

(*a*) That the accused officer exercised a certain command as alleged.

(*b*) That while so in command he discovered that a certain soldier in his command was a deserter from the military or naval service, or from the Marine Corps, as alleged.

(*c*) That such soldier was in fact such a deserter. See proof of desertion under fifty-eighth article.

(*d*) That he retained such deserter in his command without informing superior authority or the commanding officer of the organization to which the deserter belongs, as alleged.

412. *Sixty-first Article of War:*

Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty, or goes from the same without proper leave, or absents himself from his command, guard, quarters, station, or camp without proper leave, shall be punished as a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

The article is designed to cover every case not elsewhere provided for where any person subject to military law is through his own fault not at the place where he is required to be at a time when he should be there.

The first part of the article—that relating to properly appointed place of duty—applies whether such place is appointed as a rendezvous for several or for one only. Thus, it would apply in the case of a soldier failing to report as the kitchen police or leaving such duty after reporting.

A soldier turned over to the civil authorities upon application is not punishable under this article for the period he is held by them under such delivery. So, also, where a soldier is absent with leave and is held, tried, and acquitted by the civil authorities, his status does not change to absence without leave. But where the soldier is absent without leave when tried, although acquitted, or being absent with leave is convicted and held beyond the expiration of his pass, or being absent without leave is unable to return through sickness or lack of transportation facilities, or other disabilities, the period of the absence without leave will include the time he is so detained; but, in view of the fact that the absence during such time is enforced, it would be appropriate not to consider the length of such detention for the purpose of administering punishment in the case.

In computing the length in days of a period of absence for the purpose of determining the maximum punishment for an absence without leave under this article, periods of 24 hours are considered one day. Thus, a soldier who absents himself from 11.59 p. m. one day to 12.01 a. m. the next is absent only a fraction of a day as far as the maximum punishment order is concerned, although the period of absence cover parts of two calendar days.

Analysis and Proof.

The article applies to any person subject to military law. See Article 2.

The article defines a number of offenses which may be treated under the general term "Absence without leave."

I. ABSENCE WITHOUT LEAVE.

PROOF.

(1) Where the accused fails to appear at or goes from a place of duty.

(*a*) That a certain authority appointed a certain time and place for a certain duty by the accused, as alleged.

(*b*) That he failed to report to such place at the proper time, or having so reported went from the same without authority from any one competent to give him leave to do so.

(2) Where the accused is charged with absenting himself without proper leave.

(*a*) That the accused absented himself from his command, guard, quarters, station, or camp for a certain period, as alleged.

(*b*) That such absence was without authority from any one competent to give him leave.

Section III.

DISRESPECT—INSUBORDINATION—MUTINY.

413. *Sixty-second Article of War:*

Any officer who uses contemptuous or disrespectful words against the President, Vice President, the Congress of the United States, the Secretary of War, or the governor or legislature of any State, Territory, or other possession of the United States in which he is quartered shall be dismissed from the service or suffer such other punishment as a court-martial may direct. Any other person subject to military law who so offends shall be punished as a court-martial may direct.

Definitions and Principles.

The contemptuous or disrespectful words, as used in this article, cover language disrespectful and contemptuous in themselves, such as abusive epithets, denunciatory or contumelious expressions, or intemperate or malevolent comments upon official or personal acts, etc., or words disrespectful or contemptuous because of the connection in which and the circumstances under which they are used.

It is essential that a person against whom such words are used be in one of the offices named at the time; but it is immaterial whether the words are spoken against him in his official or private capacity.

The truth or falsity of the statements is, as a rule, immaterial.

Trials for offenses covered by this article have usually been for the use of "contemptuous or disrespectful words against the President," or the Government mainly as represented by

the President. The deliberate employment of denunciatory or contumelious language in regard to the President, whether spoken in public or published, or conveyed in a communication designed to be made public, has, in repeated cases, been made the subject of charges and trial under this article. (Digest, p. 120; Winthrop, p. 872.)

The language used must be disrespectful or contemptuous. Adverse criticism of the Executive expressed in emphatic language in the heat of political discussion, but not apparently intended to be personally disrespectful, should not be made the basis of trial under this article. (Idem.)

Analysis and Proof.

The article applies to any person subject to military law.

The article defines a number of offenses which may be treated under the general term of "disrespect toward the President, etc."

I. DISRESPECT TOWARD THE PRESIDENT, ETC.

PROOF.

(*a*) That the accused used certain contemptuous or disrespectful words against the President, or other of the authorities mentioned in the article, as alleged.

(*b*) Where such words are not contemptuous or disrespectful in themselves, that the words were used under certain circumstances or in a certain connection, or that a certain intended meaning gave them the character of contemptuous or disrespectful words, as alleged.

414. *Sixty-third Article of War:*

Any person subject to military law who behaves himself with disrespect toward his superior officer shall be punished as a court-martial may direct.

Definitions and Principles.

The disrespectful behavior contemplated by this article is such as detracts from the respect due to the authority and person of a superior officer. It may consist in acts or language, however expressed.

It is not essential that the disrespectful behavior be in the presence of the superior, but in general it is considered objectionable to hold one accountable under this article for what was said or done by him in a purely private conversation.

The officer toward whom the disrespectful behavior was directed must have been the superior of the accused at the time of the acts charged; but by superior is not necessarily meant a superior in rank, as a line officer, though inferior in rank, may be the commanding officer, and thus the superior of a staff officer, such as a surgeon.

Disrespect by words may be conveyed by opprobrious epithets or other contumelious or denunciatory language. (Winthrop, p. 874.)

Disrespect by acts may be exhibited in a variety of modes—as neglecting the customary salute, by a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in the presence of the superior officer. (Winthrop, p. 875.)

It is not essential that the behavior be intentional, and it is immaterial that only facts were stated; but where the person who did the acts or spoke the words did not know that the person against whom they were directed was his superior officer, such ignorance is a defense.

Analysis and Proof.

The article applies to any person subject to military law. See Article 2.

The article defines one offense, that is, disrespect toward a superior officer.

I. DISRESPECT TOWARD A SUPERIOR OFFICER.

PROOF.

(*a*) That the accused did or omitted to do certain acts or spoke certain words toward a certain officer, as alleged.

(*b*) That the behavior involved in such acts, omissions, or words was, under certain circumstance, or in a certain connection or with a certain meaning, as alleged.

(*c*) That the officer toward whom the acts, omissions, or words were directed was the accused's superior officer.

415. *Sixty-fourth Article of War:*

Any person subject to military law who, on any pretense whatsoever, strikes his superior officer or draws or lifts up any weapon or offers any violence against him, being in the execution of his office, or willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court-martial may direct.

Definitions and Principles.

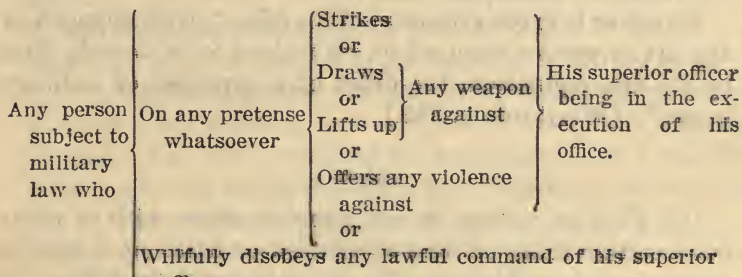
The phrase "on any pretense whatsoever" is not to be understood as excluding as a defense the fact that the striking was done in legitimate self-defense or in the discharge of some duty, such as is enjoined by the sixty-seventh article.

By "superior officer" is meant not only the commanding officer of the accused, whatever may be the relative rank of the two, but any other commissioned officer of rank superior to that of the accused. That the accused did not know the officer to be his superior is available as a defense.

Analysis and Proof.

The article applies to any person subject to military law. See Article 2.

The article embraces offenses indicated by the following diagram:


Any person subject to military law who
On any pretense whatsoever
Strikes or
Draws or
Lifts up
Any weapon against
or
Offers any violence against
or
His superior officer being in the execution of his office.
Willfully disobeys any lawful command of his superior officer.

These offenses may be treated under the following heads:

I. Assaulting superior officer.

II. Disobeying superior officer.

I. ASSAULTING SUPERIOR OFFICER.

The word "strikes" means an intentional blow with anything by which a blow can be given.

The phrase "draws or lifts up any weapon against" covers any simple assault committed in the manner stated.

The offense consisting either in a mere threatening of violence without anything further being proposed, or in an attempt to do violence which is not effectuated. The weapon chiefly had in view by the word "draw" is no doubt the sword; the term might, however, apply to a bayonet in a sheath, or to a pistol; and the drawing of either in an aggressive manner, or the raising or brandishing of the same minaciously in the presence of the superior and at him is the sort of act contemplated. The raising in a threatening manner of a firearm (whether or not loaded) or of a club, or any implement or thing by which a serious blow could be given, would be within the description—"lifts up." (Winthrop, p. 879.)

The phrase "offers any violence against him" comprises any form of battery or of mere assault not embraced in the preceding more specific terms "strikes" and "draws or lifts up." But the violence where not executed must be physically attempted or menaced. A mere threatening in words would not be an offering of violence in the sense of the article. (Winthrop, pp. 879 and 880.)

An officer is in the execution of his office "when engaged in any act or service required or authorized to be done by him by statute, regulation, the order of a superior, or military usage." (Winthrop, p. 881.)

PROOF.

(*a*) That the accused struck a certain officer with or without a certain thing or weapon or drew or lifted up a certain weapon against him or offered violence against him, as alleged.

(*b*) That such officer was the accused's superior officer at the time.

(*c*) That such superior officer was in the execution of his office at the time, as alleged.

II. DISOBEYING SUPERIOR OFFICER.

The willful disobedience contemplated is such as shows an intentional defiance of authority, as where a soldier is given an order by an officer to do or cease from doing a particular thing at once and refuses to do what is ordered or simply omits to do it.

Where the order is operative in futuro, a mere neglect to comply with it "through heedlessness, remissness, or forgetfulness is an offense chargeable not in general under this article, but under the general article" (Winthrop, p. 884), and the same is true of a mere refusal to obey such an order before the time set for its execution.

The order must relate to military duty and be one which the superior officer is authorized under the circumstances to give the accused. Disobedience of an order which has for its sole object the attainment of some private end, or which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article.

An accused can not be convicted of a violation of this article if the order was in fact unlawful; but, unless the order is plainly illegal, the disobedience of it is punishable under the general article, i. e., the ninety-sixth article.

To justify from a military point of view a military inferior in disobeying the order of a superior, the order must be one requiring something to be done which is palpably a breach of law and a crime or an injury to a third person, or is of a serious character (not involving unimportant consequences only) and if done would not be susceptible of being righted. An order requiring the performance of a military duty or act can not be disobeyed with impunity unless it has one of these characteristics.

That obedience to a command involved a violation of the accused's religious scruples is not a defense.

Failure to comply with the general or standing orders of a corps area, department, division, district, post, etc., or with the Army Regulations, is not an offense under this article, but

under the ninety-sixth article; and so of a nonperformance by a subordinate of any mere routine duty.

The form of the order is immaterial, as is the method by which it is transmitted to the accused; but the communication must amount to an order and the accused must know that it is from his superior officer; that is, a commissioned officer who is authorized to give the order whether he is superior in rank to the accused or not.

PROOF.

(*a*) That the accused received a certain command from a certain officer as alleged.

(*b*) That such officer was the accused's superior officer.

(*c*) That the accused willfully disobeyed such command.

416. *Sixty-fifth Article of War:*

Any soldier who strikes or assaults, or who attempts or threatens to strike or assault, or willfully disobeys the lawful order of a warrant officer or a noncommissioned officer while in the execution of his office, or uses threatening or insulting language, or behaves in an insubordinate or disrespectful manner toward a warrant officer or a noncommissioned officer while in the execution of his office, shall be punished as a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

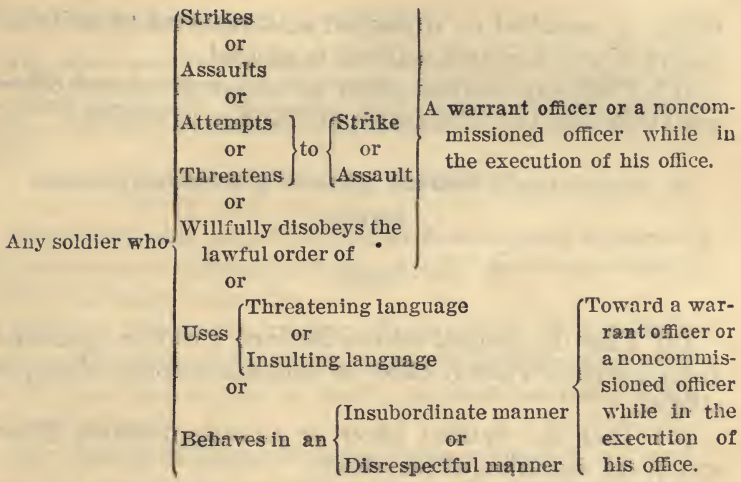
This article has the same general objects with respect to warrant officers and noncommissioned officers as the sixty-third and sixty-fourth articles have with respect to commissioned officers, namely, to insure obedience to their lawful orders, and to protect them from violence, insult, or disrespect.

The terms "willful disobedience," "lawful order," and "in the execution of his office" are used in the same sense as in the sixty-fourth article.

ANALYSIS AND PROOF.

The article applies to enlisted men only.

The article embraces offenses indicated by the following diagram:



These offenses may be briefly treated under the following headings:

I. Assaulting a warrant officer or a noncommissioned officer.

II. Disobeying a warrant officer or a noncommissioned officer.

III. Using threatening or insulting language or behaving in an insubordinate or disrespectful manner toward a warrant officer or a noncommissioned officer.

I. ASSAULTING A WARRANT OFFICER OR A NONCOMMISSIONED OFFICER.

For definition of the offense, see ninety-third article. (Division XII, par. 443, infra.)

The part of the article relating to assaults covers any unlawful violence against a warrant officer or a noncommissioned officer in the execution of his office, whether such violence is merely threatened or is advanced in any degree toward application.

PROOF.

(*a*) That the accused soldier struck a certain warrant officer or noncommissioned officer as alleged, with a certain

thing, or assaulted or attempted or threatened to strike or assault him in a certain manner, as alleged.

(*b*) That such warrant officer or noncommissioned officer was at the time in the execution of his office, as alleged.

II. DISOBEYING A warrant officer or a NONCOMMISSIONED OFFICER.

PROOF.

(*a*) That the accused soldier received a certain command from a certain warrant officer or noncommissioned officer, as alleged.

(*b*) That the warrant officer or noncommissioned officer was in the execution of his office.

(*c*) That the accused soldier willfully disobeyed such command.

III. USING THREATENING OR INSULTING LANGUAGE OR BEHAVING IN AN INSUBORDINATE OR DISRESPECTFUL MANNER TOWARD A warrant officer or a NONCOMMISSIONED OFFICER.

The phrase "while in the execution of his office" limits the application of this part of the article to language and behavior within sight or hearing of the warrant officer or noncommissioned officer toward whom it is used; the word "toward" not being used in the same sense as in the sixty-third article of war.

PROOF.

(*a*) That the accused used certain language or did or omitted to do certain acts under certain circumstances, or in a certain manner or with a certain intended meaning, as alleged.

(*b*) That such language or behavior was used toward a certain warrant officer or noncommissioned officer.

(*c*) That such warrant officer or noncommissioned officer was at the time in the execution of his office, as alleged.

417. *Sixty-sixth Article of War:*

Any person subject to military law who attempts to create or who begins, excites, causes, or joins in any mutiny or sedition in any company, party, post, camp, detachment, guard, or other command shall suffer death or such other punishment as a court-martial may direct.

Definitions and Principles.

Mutiny imports collective insubordination, and necessarily includes some combination of two or more persons in resisting lawful military authority.

Sedition implies the raising of commotion or disturbance against the State; it is a revolt against legitimate authority and differs from mutiny in that it implies a resistance to lawful civil power.

The concert of insubordination contemplated in mutiny or sedition need not be preconceived nor is it necessary that the act of insubordination be active or violent. It may consist simply in a persistent and concerted refusal or omission to obey orders or to do duty with an insubordinate intent.

Analysis and Proof.

The article applies to any person subject to military law.

The article defines five offenses relating to mutiny and five relating to sedition.

1. Attempting to create a mutiny (or sedition).
II. Beginning a mutiny (or sedition).
III. Joining in a mutiny (or sedition).
IV. Exciting a mutiny (or sedition).
V. Causing a mutiny (or sedition).

I. ATTEMPTING TO CREATE A MUTINY OR SEDITION.

An attempt to commit a crime is an act done with specific intent to commit the particular crime and proximately tending to, but falling short of, its consummation. There must be an apparent possibility to commit the crime in the manner specified. Voluntary abandonment of purpose after an act constituting an attempt is not a defense.

The intent which distinguishes mutiny or sedition is the intent to resist lawful authority in combination with others.

The intent to create a mutiny or sedition may be declared in words, or, as in all other cases, it may be inferred from acts done or from the surrounding circumstances.

A single individual may harbor an intent to create a mutiny and may commit some overt act tending to create a mutiny or sedition and so be guilty of an attempt to create a mutiny or sedition, alike whether he was joined by others or not, or whether a mutiny or sedition actually followed or not.

PROOF.

(*a*) An act or acts of accused which approximately tended to create a certain intended (or actual) collective insubordination.

(*b*) A specific intent to create a certain intended (or actual) collective insubordination.

(*c*) That the insubordination occurred or was intended to occur in a company, party, post, camp, detachment, guard, or other command in the Army of the United States.

II–III. BEGINNING OR JOINING IN A MUTINY OR SEDITION.

There can be no actual mutiny or sedition until there has been an overt act of insubordination joined in by two or more persons, and so no person can be guilty of beginning or joining in a mutiny unless an overt act of mutiny is proved. A person can not be guilty of beginning a mutiny unless he is the first, or among the first, to commit an overt act of mutiny; a person can not join in a mutiny without joining in some overt act. Hence presence of the accused at the scene of mutiny is necessary in these two cases.

PROOF.

(*a*) The occurrence of certain collective insubordination in a company, party, post, camp, detachment, or other command in the Army of the United States.

(*b*) That the accused began or joined in the certain collective insubordination.

IV–V. CAUSING OR EXCITING A MUTINY OR SEDITION.

As in II and III, supra, no person can be guilty of causing or exciting a mutiny unless an overt act of mutiny follows his efforts. But a person may excite or cause a mutiny without taking personal part in or being present at the demonstrations of mutiny which result from his activities.

PROOF.

(*a*) The occurrence of certain collective insubordination in a certain company, party, post, camp, detachment, or guard, or other command in the Army of the United States.

(*b*) Acts of the accused tending to cause or excite the certain collective insubordination.

418. *Sixty-seventh Article of War:*

Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or knowing or having reason to believe that a mutiny or sedition is to take place, does not without delay give information thereof to his commanding officer shall suffer death or such other punishment as a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

See "Mutiny and Sedition," paragraph 417, supra.

ANALYSIS AND PROOF.

The article applies only to officers and soldiers. It does not apply to members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, or any other persons subject to military law, except officers and enlisted men.

It defines two offenses relating to mutiny and two relating to sedition.

I. Being present at a mutiny (or sedition), failing to use the utmost endeavor to suppress it.

II. Having knowledge or reason to believe that a mutiny (or sedition) is to take place, failing to give information thereof to his commanding officer without delay.

I. FAILURE TO SUPPRESS MUTINY (OR SEDITION).

Mere presence countenancing such collective insubordinations and disturbances as mutinies, riots, and seditions has been considered criminal for over a century. The article

goes a step further and requires of officers and soldiers their utmost endeavors to suppress such disorders.

One is not present at a mutiny unless an act or acts of collective insubordination occur in his presence.

Utmost endeavor is a relative term. The rule governing the lawful use of force to suppress crime or arrest wrongdoers is that as much force may be used as is reasonably necessary to accomplish the desired purpose, and no more. This article has been construed as authorizing and requiring the most extreme measures—even to the using of a dangerous weapon and the taking of life—where such extreme measures are reasonably necessary. But all the circumstances of necessity are to be considered. Means which in war and before the enemy would be not only justified but laudable, might, in time of peace, render the person employing them criminally and civilly liable for abuse of authority.

PROOF.

(*a*) The occurrence of an act or acts of collective insubordination in the presence of the accused.

(*b*) Acts or omissions of the accused which constitute a failure to use his utmost endeavor to suppress such acts.

II. FAILURE TO GIVE INFORMATION OF MUTINY (OR SEDITION.)

Where circumstances known to the accused are such as would have caused a reasonable man in the same or similar circumstances to believe that a mutiny or sedition was impending, these circumstances will be sufficient to charge the accused with such reason to believe as will render him culpable under the article.

It is not a necessary element of the crime that the impending mutiny or sedition materialize.

"Delay" imports the lapse of an unreasonable time without action.

The expression "commanding officer" here includes in its meaning any officer having a military command over the person who has knowledge or reason to believe that a mutiny or sedition is impending.

PROOF.

(*a*) That the accused knew that a mutiny or sedition was impending or that he knew of circumstances that would have induced, in a reasonable man, a belief that a mutiny or sedition was impending.

(*b*) Acts or omissions of the accused which constitute a failure or unreasonable delay in informing his commanding officer of his knowledge or belief.

NOTE.—Similar acts or omissions by a member of the Army Nurse Corps, a warrant officer, an Army field clerk, a field clerk Quartermaster Corps, or any other person subject to military law, except a commissioned officer or an enlisted man, are chargeable under A. W. 96.

419. *Sixty-eighth Article of War:*

All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, **and noncommissioned officers have power to part and quell all quarrels, frays, and disorders among persons subject to military law and to order officers who take part in the same into arrest, and other persons subject to military law who take part in the same into arrest or confinement, as circumstances may require, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer,** nurse, band leader, warrant officer, field clerk, **or noncommissioned officer, or draws a weapon upon or otherwise threatens or does violence to him, shall be punished as a court-martial may direct.**

DEFINITIONS AND PRINCIPLES.

A fray is a fight in a public place to the terror of the people, in which acts of violence occur or dangerous weapons are exhibited or threatened to be used. All persons aiding or abetting a fray are principals. The word "frays" is thus seen to be somewhat restrictive, but the words "quarrels" and "disorders" include any disturbance of a contentious character from a mere war of words to a rout or riot.

To quell is to quiet, allay, abate, or put down.

It is immaterial under the article whether the officer, member of the Army Nurse Corps, warrant officer, Army field clerk, field clerk Quartermaster Corps, noncommissioned officer or other person authorized by the article so to do who essays to part or quell quarrels, frays, and disorders is on a duty status or not, as it is immaterial whether the persons engaged in the disorder are superior to him in rank or not.

ANALYSIS AND PROOF.

The punitive portion of the article applies to all persons subject to military law. It is designed to enforce the authority of officers and noncommisisoned officers, and the other persons so authorized in the article, to part and quell certain disorders and to order the participants into confinement or arrest.

The article defines four crimes:

I. Refusal to obey an order of an officer, member of the Army Nurse Corps, warrant officer, Army field clerk, field clerk Quartermaster Corps, band leader, or noncommissioned officer placing the accused in arrest or confinement.

II. Upon being ordered into arrest or confinement, drawing a weapon on the officer, member of the Army Nurse Corps, warrant officer, Army field clerk, field clerk Quartermaster Corps, band leader, or noncommissioned officer giving the order.

III. Upon being ordered into arrest or confinement, threatening the officer, member of the Army Nurse Corps, warrant officer, Army field clerk, field clerk Quartermaster Corps, band leader, or noncommissioned officer giving the order.

IV. Upon being ordered into arrest or confinement, doing violence to the officer, member of the Army Nurse Corps, warrant officer, Army field clerk, field clerk Quartermaster Corps, band leader, or noncommissioned officer giving the order.

I. DISOBEDIENCE OF ORDERS INTO ARREST OR CONFINEMENT.

It should appear that the power conferred by the article was being exercised for the purpose stated, and therefore the charges and proof should refer to the order given during the disorder. It should be made to appear that the accused heard or understood the order and knew that the person giving it was an officer or noncommissioned officer, or other person thereunto authorized by the article.

PROOF.

(*a*) That the accused was a participant in a certain quarrel, fray, or disorder occurring among persons subject to military law.

(*b*) That during the disorder a certain officer, member of the Army Nurse Corps, warrant officer, Army field clerk, field clerk Quartermaster Corps, band leader, or noncommissioned officer ordered the accused into arrest (if accused is an officer) or into arrest or confinement (if accused is a person subject to military law other than an officer), with a view to quell or part the disorder.

(*c*) That the accused refused to obey.

II, III, IV. THREATENING, DRAWING A WEAPON UPON, OR OFFERING VIOLENCE TO, AN OFFICER, member of the Army Nurse Corps, warrant officer, Army field clerk, field clerk Quartermaster Corps, band leader, OR NONCOMMISSIONED OFFICER.

The proof of the second, third, and fourth crimes defined by the article should follow in form and essentials the proof required under the first crime (disobedience of order into arrest or confinement, supra), except that instead of proving a refusal to obey (clause "(c)", supra), drawing a weapon, making a threat, or doing violence must be proved as the consummation of the particular offense. The word threat as here used includes any menacing action, either by gesture or by words.

SECTION IV.

ARREST—CONFINEMENT.

420. *Sixty-ninth Article of War:*

Any person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest as circumstances may require; but when charged with a minor offense only such person shall not ordinarily be placed in confinement. **Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer** or cadet **who breaks his arrest or who escapes from confinement,** whether before or after trial or sentence and **before he is set at liberty by proper authority, shall be dismissed from the service or suffer such other punishment as a court-martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest,** whether before or after trial or sentence and **before he is set at liberty by proper authority, shall be punished as a court-martial may direct.**

DEFINITIONS AND PRINCIPLES.

The distinction between arrest and confinement lies in the difference between the kinds of restraint imposed. In arrest

the restraint is moral restraint imposed by the orders fixing the limits of arrest, or by the terms of the article. Confinement imports some physical restraint.

Analysis and Proof.

The article applies to all persons subject to military law. The article defines two crimes:

I. Breach of arrest.

II. Escape from confinement.

I. BREACH OF ARREST.

The offense is committed when the person restrained infringes the limits set by orders, or by the sixty-ninth article of war, and the intention or motive that actuated him is immaterial to the issue of guilt, though, of course, proof of inadvertence or bona fide mistake is admissible to guide the court in assessing punishment. The unlawfulness of the arrest is a valid defense, but innocence of the accusation upon which the arrest is imposed is entirely irrelevant.

PROOF.

(*a*) That the accused was duly placed in arrest.

(*b*) That before he was set at liberty by proper authority, whether before or after trial or sentence, he transgressed the limits fixed by the sixty-ninth article of war or by the orders of proper authority.

II. ESCAPE FROM CONFINEMENT.

An escape may be either with or without force or artifice, and either with or without the consent of the custodian. Any completed casting off of the restraint of confinement, before being set at liberty by proper authority, is an escape from confinement, and a lack of effectiveness of the physical restraint imposed is immaterial to the issue of guilt. It seems, however, that an escape is not complete until the prisoner has, momentarily at least, freed himself from the restraint of his confinement, so, if the movement toward escape is opposed, or before it is completed an immediate pursuit ensues, there will be no escape until opposition is overcome, or pursuit is

shaken off. In cases where the escape is not completed the offense should be charged as an attempt under the ninety-sixth article of war.

PROOF.

(*a*) That the accused was placed in confinement.

(*b*) That he freed himself from the restraint of his confinement before he had been set at liberty by proper authority, whether before or after trial or sentence.

420½. *Seventieth Article of War:*

Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

No charge will be referred for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

Before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice.

When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct. When a person is held for trial by general court-martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.

Definitions and Principles.

As to distinction between "arrest" and "confinement" see the preceding article.

The punitive clause of this article, above quoted, has no application, except in cases where the accused is placed either in arrest or confinement. But in cases where the accused is not arrested or confined, an officer responsible for unnecessary and unusual delay, either in investigating the charges or in carrying the case to a final conclusion, may be charged with neglect to the prejudice of good order and military discipline under the ninety-sixth article of war.

The purpose of the provision above quoted, which was introduced into the seventieth article of war by the code of 1920, is to insure expedition in disposing of charges, and the punishment of officers responsible for unnecessary delay in connection therewith.

Analysis and Proof.

The article applies only to officers.

The article defines two offenses:

I. Unnecessary delay in investigating charges against an accused in arrest or confinement.

II. Unnecessary delay in carrying a case to a final conclusion where an accused is placed in arrest or confinement.

I. Unnecessary Delay in Investigating Charges Against an Accused in Arrest or Confinement.

PROOF.

(a) That the accused is an officer.

(b) That, as alleged in the specification, the accused was, as such officer, charged with the duty of making or directing, or assisting in, or some other duty in connection with, the investigation of charges against an accused who was at the time in arrest or in confinement, as the case may be.

(c) That in such investigation there was unnecessary delay, as alleged in the specification.

(d) Facts and circumstances indicating that the accused was responsible for such unnecessary delay, as alleged in the specification.

II. Unnecessary Delay in Carrying a Case to a Final Conclusion Where an Accused Is Placed in Arrest or Confinement.

PROOF.

(a) That the accused is an officer.

(b) That the accused, as such officer, was charged with a certain duty, as alleged in the specification, in connection with the case of an accused person who was placed either in arrest or in confinement.

(c) That a certain unnecessary delay, as alleged in the specification, occurred in carrying the case of such accused to a final conclusion.

(d) Facts and circumstances indicating that the accused was responsible for such unnecessary delay.

421. *Seventy-first Article of War:*

No provost marshal or commander of a guard shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States, provided the officer committing shall, at the time, deliver an account in writing, signed by himself, of the crime or offense charged against the prisoner. Any officer or soldier so refusing shall be punished as a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

The words "commander of a guard" include a commander of any rank or grade, and hence a noncommissioned officer or private. The term "any prisoner" includes civil as well as military prisoners who are committed according to the terms of the article. A provost marshal or commander of a guard may receive a prisoner without an account of the charge against him or other due formality of commitment, but he must receive the prisoner where the required account in writing accompanies the commitment.

A mere name or description of the offense charged in common parlance when written and signed by the committing officer is a sufficient "account in writing."

ANALYSIS AND PROOF.

The article applies to officers and soldiers.

The article defines one crime:

I. REFUSING TO RECEIVE OR KEEP A PRISONER COMMITTED WITH A WRITTEN ACCOUNT OF THE OFFENSE CHARGED AGAINST HIM SIGNED BY THE OFFICER COMMITTING THE PRISONER.

PROOF.

(*a*) That the accused was a provost marshal or commander of a guard in the military forces of the United States.

(*b*) That a certain prisoner was committed to his charge by a certain officer belonging to the forces of the United States.

(*c*) That at the time of commitment the committing officer delivered to the accused a written account of the crime or offense charged against the prisoner, which account was signed by the committing officer.

(*d*) That the accused refused to receive or keep the prisoner.

422. *Seventy-second Article of War:*

Every commander of a guard to whose charge a prisoner is committed shall, within twenty-four hours after such confinement, or as soon as he is relieved from his guard, report in writing to the commanding officer the name of such prisoner, the offense charged against him, and the name of the officer committing him; and if he fails to make such report, he shall be punished as a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

The term "commander of a guard" includes commanders of any rank or grade.

The term "prisoner" includes civilian as well as military prisoners.

The term "commanding officer" imports the commander to whom the guard report is properly made.

ANALYSIS AND PROOF.

The article applies to all persons subject to military law. It defines one offense:

I. FAILURE TO RENDER A REPORT AS PRESCRIBED.

PROOF.

(*a*) That the accused was commander of a certain guard in the military forces of the United States.

(*b*) That a prisoner was committed to his charge.

(*c*) That the accused—

1. Failed to make any report at all, or,

2. That the report rendered was not in writing, or,

3. That no report was rendered within 24 hours after confinement, or as soon as accused was relieved from his guard, or,

4. That the report failed to set forth one or more of the particulars prescribed.

423. *Seventy-third Article of War:*

Any person subject to military law who, without proper authority, releases any prisoner duly committed to his charge, or who through neglect or design suffers any prisoner so committed to escape, shall be punished as a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

The article describes three long-recognized common-law crimes.

It looks to the punishment of any person who is responsible for the unauthorized release or escape of a prisoner duly committed to his charge, and hence any member of a guard, party, escort, and convoy, or any person subject to military law to whose charge a prisoner is committed may be guilty of an offense under this article. Where a prisoner is committed to the commander of a guard, party, escort, or convoy, and is released by, or escapes from, a subordinate or subordinates to whom the commander has duly delegated custody of the prisoner, or to whom that custody duly falls as an incident of duty, all will be responsible under this article, except those who can show that the escape or release occurred under circumstances against which they could not reasonably guard.

The words "any prisoner" import both military and civilian prisoners.

A person may receive a prisoner in his capacity as commander or member of a guard, or he may be burdened with such a responsibility as a personal trust. In the former case, the lowest authority competent to release the prisoner is the chief of the command of the guard by which the prisoner is held. In the latter case, the authority who has imposed the trust, and who was competent to do so, is the lowest "proper authority" to order a release.

While a commander of the guard must receive a prisoner properly committed by any officer, the power of the committing officer ceases as soon as he has committed the prisoner, and he is not a "proper authority" to order a release.

An officer is not responsible under this article unless the prisoner was duly committed, but, as was pointed out in the discussion of the seventy-first article, an officer may receive a prisoner not committed in strict compliance with the terms of that article or other law, and if, having so received a prisoner, he releases such prisoner, or suffers him to escape, he may be held to answer, under the ninety-sixth article, for any dereliction of duty that may be predicated on his conduct in the case.

Analysis and Proof.

The article applies to any person subject to military law.

The article defines three crimes:

I. Releasing a prisoner without proper authority.

II. Suffering a prisoner to escape through neglect.

III. Suffering a prisoner to escape through design.

I. RELEASING A PRISONER WITHOUT PROPER AUTHORITY.

A release imports a removal of restraint from the prisoner in which the custodian is the sole actor, and in which the prisoner takes no initiative.

PROOF.

(*a*) That a certain prisoner was duly committed to the charge of the accused.

(*b*) That the accused released him without proper authority.

II. SUFFERING A PRISONER TO ESCAPE THROUGH NEGLECT.

The word "neglect" is here used in the sense of the word "negligence."

Negligence is a relative term. It is defined in law as the absence of due care. The legal standard of care is that which would have been taken by a reasonably prudent man in the same or similar circumstances. This test looks to the standard required of persons acting in the capacity in which the accused was acting. Thus, if the accused is an officer, the test will be, "How would a reasonably prudent officer have acted?" If the circumstances were such as would have indicated to a reasonably prudent officer that a very high order of care was required to prevent escape, then the accused must be held to a very high order of care. The test is thus elastic, logical, and just.

A prisoner can not be said to have escaped until he has overcome the opposition that restrained him and shaken off immediate pursuit. Once he has done these things, the fact that he returns, is taken in a fresh pursuit, is killed, or dies, will not relieve the person accused of guilt under this article.

PROOF.

(*a*) That a certain prisoner was duly committed to the charge of the accused.

(*b*) That the prisoner escaped.

(*c*) That the accused did not take such care to prevent escape as a reasonably prudent person, acting in the capacity in which the accused was acting, would have taken in the same or similar circumstances. (This constitutes neglect.)

(*d*) That the escape was the proximate result of the neglect of the accused.

III. SUFFERING A PRISONER TO ESCAPE THROUGH DESIGN.

In law a wrongful act is designed when it is intended or when it results from conduct so shockingly and grossly devoid of care as to leave room for no inference but that the act was contemplated as an extremely probable result of the course of conduct followed. Thus, on a charge of suffering a prisoner to escape through design, evidence of gross negligence may be received as probative of design.

It sometimes happens that a prisoner has been permitted larger limits than should have been allowed, and an escape is consummated without hindrance. It does not at all follow that such an escape is to be considered as designed. The conduct of the responsible custodian is to be examined in the light of all the circumstances of the case, the heinousness of the crime with which the prisoner is charged, the notoriety of the prisoner's guilt, the probability of his return, and the intention and motives of the custodian.

PROOF.

(*a*) That a certain prisoner was duly committed to the charge of the accused.

(*b*) That the prisoner escaped.

(*c*) 1. Acts of the accused tending to permit escape. 2. Acts of the accused probative of a design to suffer the escape.

(*d*) That as a result of these acts and of this design the prisoner escaped.

424. *Seventy-fourth Article of War:*

When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

When, under the provisions of this article, delivery is made to the civil authorities of an offender undergoing sentence of a court-martial, such delivery, if followed by conviction, shall be held to interrupt the execution of the sentence of the court-martial, and the offender shall be returned to military custody, after having answered to the civil authorities for his offense, for the completion of the said court-martial sentence.

Definitions and Principles.

I. REFUSING TO DELIVER ACCUSED PERSONS.

The words "commanding officer," as here used, import the officer who is chief of the complete integral place, body

of troops, or detachment, wherein the person accused is serving at the time application is duly made. The words "upon application duly made" prescribe a condition precedent to responsibility. They are inserted to prevent the possibility of false arrests, and to enable the commanding officer to satisfy himself of the true official character of him who makes the application, of the subsistence of an actual accusation against the person sought, and of the locus of the charged crime or offense.

The commanding officer should require that the application show that the crime or offense is alleged to have been committed within the geographical limits of the States of the Union and the District of Columbia. A sufficient form of application will be a written communication setting forth the fact of such an accusation of a crime or offense committed within the prescribed limits as would subject the accused person to arrest by the civil authorities for the purposes of trial, or that a warrant for such arrest has issued, and a request that the commanding officer deliver the person accused to the civil authorities or assist them in apprehending or securing him. When the military jurisdiction has actively attached in any of the ways prescribed in the article, the commanding officer may, but he is not required to, make the prescribed delivery.

II. REFUSING TO AID IN APPREHENDING ACCUSED PERSONS.

The commanding officer is required not only to deliver the person accused but to aid in apprehending and securing him. The article therefore contemplates cases where, after apprehension by either the military or civil authorities, an application is duly made to a commanding officer for his assistance in securing a person subject to military law and accused of crime.

"Utmost endeavor" is to be understood in a reasonable sense with reference to the circumstances of the particular case. Thus, if the accused is not within military control, as where he is absent as a deserter, nothing more can be required of a commander than to furnish civil authority

such information of his whereabouts and the prospect of his return as may be available.

While commanding officers are enjoined to use their utmost endeavor in carrying out the provisions of this law, a mere inadvertent neglect to take some necessary step toward delivery, apprehension, or securing of the person accused will not constitute an offense under this article, which contemplates only refusals and willful neglects to act.

Analysis and Proof.

The punitive portion of the article applies only to officers, but the obligation to deliver or assist in apprehending and securing rests on all persons subject to military law.

The article defines two offenses:

I. Refusing or willfully neglecting to deliver an accused person.

II. Refusing or willfully neglecting to aid in apprehending and securing an accused person.

The essentials of proof are similar in both cases.

Proof.

(*a*) That the accused was the commanding officer of a certain integral place, body of troops, or detachment.

(*b*) That a certain person subject to military law under his command stood accused of a certain crime or offense, committed within the geographical limits of the States of the Union and the District of Columbia.

(*c*) That application was duly made to the accused officer by a person in proper civil authority—

1. To deliver the accused person to the civil authorities; or
2. To aid the officers of justice in apprehending and securing, or either, the accused person.

(*d*) Acts or omissions of the accused officer which constitute a refusal or a willful neglect to deliver the accused person or to aid in apprehending or securing him.

Section V.

WAR OFFENSES.

425. *Seventy-fifth Article of War:*

Any officer or soldier who, before the enemy, **misbehaves himself, runs away, or shamefully abandons or delivers up** or by any misconduct, disobedience, **or** neglect endangers the safety of **any fort, post, camp, guard, or other command which it is his duty to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, or by any means whatsoever occasions false alarms in camp, garrison, or quarters, shall suffer death or such other punishment as a court-martial may direct.**

Definitions and Principles.

Misbehavior is by no means confined to acts of cowardice. It is a general term, and as here used it renders culpable under the article any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the history of our arms. Running away is but a particular form of misbehavior specifically made punishable by this article.

"The enemy" imports any hostile body that our forces may be opposing and well includes a rebellious mob, a band of renegades, or a tribe of Indians.

Analysis and Proof.

The article applies only to officers and soldiers. It defines eight offenses:

I. Misbehavior before the enemy.

II. Running away before the enemy.

III. Shamefully abandoning or delivering up any command.

IV. Endangering the safety of any command by any (1) misconduct, (2) disobedience, or (3) neglect.

V. Speaking words inducing others to so misbehave, run away, or abandon or deliver up or endanger the safety of any command.

VI. Casting away arms or ammunition.

VII. Quitting post or colors to plunder or pillage.

VIII. Occasioning false alarms.

I. MISBEHAVIOR BEFORE THE ENEMY.

Under this clause may be charged any act of treason, cowardice, insubordination, or other unsoldierly conduct committed in the presence of the enemy.

PROOF.

(*a*) That the accused was serving in the presence of an enemy.

(*b*) Acts or omissions of the accused not conformable to the standard of soldierly conduct set by the history of our arms.

II. RUNNING AWAY BEFORE THE ENEMY.

(*a*) That the accused was serving in the presence of an enemy.

(*b*) That he misbehaved himself by running away.

III. SHAMEFULLY ABANDONING OR DELIVERING UP ANY COMMAND.

While the word "abandon" is broad enough to include a case in which a soldier or a subordinate officer leaves a fort, post, guard, or command which it is his duty to defend, it is probable that this clause of the article looks only to offenses by the commanding officers of such commands, and that abandonment by a subordinate should be charged as misbehavior or running away.

The words "deliver up" are synonymous with the word "surrender."

The surrender or abandonment of a command by an officer charged with its defense can only be justified by the utmost necessity and extremity, such as the exhaustion of provisions or water, the absence of hope of relief, and the certainty or extreme probability that no further effort could prevent the place, with its garrison, their arms, and magazines, from presently falling into the hands of the enemy. Unless such absolute necessity is shown, the conclusion must be that the surrender or abandonment was shameful within the meaning of this article.

An officer's duty to defend may be imposed by orders or by the circumstances in which he finds himself at a particular

stage of operations; but an officer will find less justification in abandoning a post that he has been ordered to defend than in abandoning one that he has decided to defend. He will have less justification in delivering up a post than in abandoning it, and in delivering up a post that he has been ordered to defend he will have no justification at all except such as can be found in proof that no further resistance was possible.

PROOF.

(*a*) That the accused was charged by orders or by circumstances with a duty to defend a certain fort, post, camp, guard, or other command.

(*b*) That without justification he abandoned it or surrendered it.

IV. Endangering the Safety of Any Command by Any (1) Misconduct, (2) Disobedience, or (3) Neglect.

"Misconduct," like misbehavior, implies a wrongful intention, and not a mere error of judgment. It means in general "a transgression of some established and definite rule of action, where no discretion is left, except what necessity may demand"; whereas on the other hand carelessness and negligence and unskillfullness are transgressions of some established, but indefinite rule of action where some discretion is necessarily left to the actor. "Misconduct" is a violation of definite law; "carelessness a forbidden quality of an act and is necessarily indefinite." (Vol. 5, "Words and Phrases," p. 4531.)

As to "disobedience," see Subparagraph II, paragraph 415, supra, under A. W. 64.

PROOF.

Facts and circumstances showing that the accused endangered the safety of a certain command, as alleged, by certain (1) misconduct, (2) disobedience, or (3) neglect, as alleged (as the case may be).

V. SPEAKING WORDS INDUCING OTHERS TO MISBEHAVE, RUN AWAY, OR ABANDON OR DELIVER UP or endanger the safety of ANY COMMAND.

The words "to do the like" refer to the offenses of misbehavior and running away, as well as to abandoning or delivering up or endangering the safety of a command.

The inducement contemplated is verbal only, but it may include any argument, persuasion, threat, language of discouragement or alarm, or false or incorrect statement which may avail to bring about an unnecessary surrender, retreat, or any misbehavior, or endanger the safety of the command, before the enemy. The offense will not be complete, however, unless the words spoken do induce some person other than the accused to misbehave, run away, or abandon or surrender, or by some misconduct, disobedience, or neglect endanger the safety of, a command. It is to be noted, however, that speaking words whose natural tendency is to induce others to do any of these things may in itself constitute misbehavior of the speaker within the meaning of the article, although the words spoken induce no misconduct on the part of others.

PROOF.

(*a*) That some person other than the accused misbehaved in the presence of the enemy or ran away or abandoned or delivered up, or by some misconduct, disobedience, or neglect endangered the safety of, any command which it was his duty to defend.

(*b*) Words spoken by the accused which induced such action.

VI. CASTING AWAY ARMS OR AMMUNITION.

PROOF.

(*a*) That the accused cast away certain arms or ammunition as specified.

VII. QUITTING POST OR COLORS TO PLUNDER OR PILLAGE.

The word "post" includes any place of duty, whether permanently or temporarily fixed. The term "colors" was used to include cases where the offender's organization is moving, but the words "quits his post," as here used, import any unauthorized leaving of that place where the accused should be.

In proving this crime an intent to pillage or plunder must be shown. The words "to pillage or plunder" may be properly paraphrased "to seize and appropriate public or private property." The offense is no less committed, though

the quitting is by *quasi* authority, as where soldiers quit the place where they should be to go forth and maraud in company with an officer or noncommissioned officer.

The act is complete when the accused has left his post with the described intent, although he may never have consummated his design.

PROOF.

(*a*) That the accused left his post of duty.

(*b*) That the intention of the accused in leaving was to seize and appropriate private or public property.

VIII. OCCASIONING FALSE ALARMS.

The article is intended as well to guard the repose and tranquillity of troops as to avoid the ill effect or morale which must inevitably follow needless excursions and alarms. The article contemplates the spreading of false and disturbing rumors and reports as well as the needless giving of such alarm signals as the beating of drums and the blowing of trumpets.

The intent is immaterial. If the alarm was given, and it appears that there was no material cause or occasion which should reasonably justify a general alarm, the offense is complete.

PROOF.

(*a*) That an alarm was occasioned in a certain camp, garrison, or quarters.

(*b*) Conduct of the accused which occasioned the alarm.

(*c*) That there was no reasonable or sufficient justification in fact for occasioning the alarm.

NOTE.—"Officer or Soldier."—No one except a commissioned officer or an enlisted man can be tried under the seventy-fifth article of war. Any other person subject to military law, such as a member of the Army Nurse Corps, a warrant officer, an Army field clerk, or a field clerk Quartermaster Corps, can not be charged under this article, but for the offenses denounced in this article may be tried under the ninety-sixth article of war, under which, however, the death penalty can not be inflicted.

426. *Seventy-sixth Article of War:*

Any person subject to military law who compels or attempts to compel any commander of any garrison, fort, post, camp, guard, or other command, to give it up to the enemy or to abandon it shall be punishable with death or such other punishment as a court-martial may direct.

Definitions and Principles.

When the surrender or abandonment of a command is induced or attempted to be brought about by words spoken, the offense should be charged under the seventy-fifth article. Where the surrender or abandonment is compelled or attempted to be compelled by acts rather than words, the charge should be laid under the present article.

The offenses here contemplated are very like that of a mutiny which results in the surrender or abandonment of any command, or like an attempt to mutiny, but, unlike mutiny, no concert of action is an essential element of these offenses. The offense of compelling the giving up or abandonment of the garrison, etc., is not complete until the command is abandoned or given up to the enemy. The offense of attempting to compel any commander of any garrison, etc., to give it up to the enemy or to abandon it does not require an actual abandonment or giving up of the garrison, etc., to the enemy; but there must be some act done with this purpose in view, but which falls short of an actual accomplishment of the purpose. See paragraph 425 for meaning of abandon; to "give up" is to be interpreted as meaning the same as "delivers up" in paragraph 425.

Analysis and Proof.

The article applies to any person subject to military law.

The article defines two crimes.

I. COMPELLING COMMANDER TO SURRENDER.

(*a*) That a certain commander has abandoned his command or given it up to the enemy.

(*b*) Acts or omissions of the accused that compelled the commander to abandon his command or give it up to the enemy.

II. Attempting to Compel Commander to Surrender.

PROOF.

(a) That a certain commander was in command of a garrison, fort, post, camp, guard, or other command.

(b) Acts or omissions of the accused done or omitted with the intent or purpose of compelling such commander to abandon it or give it up to the enemy.

427. *Seventy-seventh Article of War:*

Any person subject to military law who makes known the parole or countersign to any person not entitled to receive it according to the rules and discipline of war, or gives a parole or countersign different from that which he received, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

A countersign is a word given from the principal headquarters of a command to aid guards and sentinels in their scrutiny of persons who apply to pass the lines.

A parole is a word used as a check on the countersign. It is imparted only to those who are entitled to inspect guards and to commanders of guards.

ANALYSIS AND PROOF.

The article applies to any person subject to military law.

It defines two offenses:

I. Making known the parole or countersign.

II. Giving a parole or countersign different from that received.

I. MAKING KNOWN THE PAROLE OR COUNTERSIGN.

The class of persons entitled to receive the countersign will expand and contract under the varying circumstances of war. Who these persons are will be determined largely, in any particular case, by the general or special orders under which the accused was acting. It is no defense under the terms of this law that the accused *did not know* that the person to whom he communicated the countersign or parole was not entitled to receive it. Before imparting such a word it behooves a person subject to military law to determine at his peril that

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the person to whom he presumes to make known the word is a person authorized to receive it.

The intent or motive that actuated the accused is immaterial to the issue of guilt, as would also be the circumstance that the imparting was negligent or inadvertent. It is likewise immaterial whether the accused had himself received the password in the regular course of duty or whether he obtained it in some other way.

PROOF.

(*a*) That the accused made known the countersign or parole to a certain person, known or unknown.

(*b*) That the person was not entitled to receive it.

II. GIVING A PAROLE OR COUNTERSIGN DIFFERENT FROM THAT RECEIVED.

The intent or motive that actuated the accused is immaterial to the issue of guilt.

PROOF.

(*a*) That the accused received a certain countersign or parole.

(*b*) That he gave a parole or countersign different from that which he received.

428. *Seventy-eighth Article of War:*

Any person subject to military law who, in time of war, forces a safeguard shall suffer death or such other punishment as a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

A safeguard is a detachment, guard, or detail posted by a commander for the purpose of protecting some person or persons, place, or property. The term also imports a written order left by a commander with an enemy subject or posted upon enemy property for the protection of the individual or property concerned.

Any trespass on the protection of the safeguard will constitute an offense under the article, provided that the accused was aware of the existence of the safeguard.

ANALYSIS AND PROOF.

The article applies to all persons subject to military law.
It defines one offense:

I. FORCING A SAFEGUARD.

PROOF.

(*a*) That a safeguard had been issued or posted for the protection of a certain person or persons, place, or property.

(*b*) That, with knowledge of the safeguard, or under circumstances that charged him with notice of the safeguard, the accused trespassed upon its protection.

429. *Seventy-ninth Article of War:*

All public property taken from the enemy is the property of the United States and shall be secured for the service of the United States, and any person subject to military law who neglects to secure such property or is guilty of wrongful appropriation thereof shall be punished as a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

Immediately upon its capture from the enemy public property becomes the property of the United States. Neither the individual who takes it nor any other person has any private right in such property. On the contrary, every person subject to military law has an immediate duty to take such steps as are within his powers and functions to secure such property to the service of the United States and to protect it from destruction or loss.

ANALYSIS AND PROOF.

The article applies to all persons subject to military law. (See A. W. 2.)

It defines two offenses:

I. Neglecting to secure captured public property.

II. Wrongful appropriation of captured public property.

I. NEGLECTING TO SECURE CAPTURED PUBLIC PROPERTY.

The neglect will consist in a failure to take such steps as a reasonably prudent man acting in the capacity in which ac-

cused was acting would have taken in the same or similar circumstances to secure the property in question to the service of the United States.

PROOF.

(*a*) That certain public property was captured from the enemy.

(*b*) That the functions of the accused vested him with a certain power and imposed on him a certain duty to secure such property to the service of the United States.

(*c*) Acts or omissions of the accused which evidence a failure to take such steps to secure the property to the service of the United States as would have been taken by a reasonably prudent person acting in the capacity in which the accused was acting and in the same or similar circumstances.

II. WRONGFUL APPROPRIATION OF CAPTURED PUBLIC PROPERTY.

Any unauthorized and unjustified act in disposition of property which is inconsistent with the true owner's right of complete dominion over it is a wrongful appropriation of it. A wrongful appropriation is distinguished from a neglect in that it presumes some act, while a neglect may consist solely in an omission.

PROOF.

(*a*) That certain public property was captured from the enemy.

(*b*) Acts of the accused in disposition of the captured public property, inconsistent with the United States right of complete dominion over that property.

430. *Eightieth Article of War:*

Any person subject to military law who buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or to any other person directly or indirectly connected with himself, or who fails whenever such property comes into his possession or custody or within his control to give notice thereof to the proper authority and to turn over such property to the proper authority without delay, shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial, military commission, or other military tribunal may adjudge, or by any or all of said penalties.

Definitions and Principles.

This article is broader than the preceding one in the following particulars: It protects abandoned as well as captured property, and private as well as public captured or abandoned property.

Unless the captured or abandoned property is private, or unless the acts charged fall within the descriptions of this article, the offense should be charged under article 79, supra.

Analysis and Proof.

The article applies to all persons subject to military law. (See A. W. 2.)

It defines a number of offenses which may be treated as follows:

I. Any dealing in or disposition of captured or abandoned property whereby the accused receives or expects to receive an advantage.

II. Failure or delay in reporting the receipt of and in turning over to proper authority captured or abandoned property.

I. DEALING IN CAPTURED OR ABANDONED PROPERTY.

This portion of the article addresses itself to several specific acts of wrongful dealings and looks especially to cases where, instead of appropriating the property to his own use in kind, the accused in any other way deals with it to advantage. The article prohibits receipt as well as disposition of captured or abandoned property by barter, gift, pledge, lease, or loan. It lies against the destruction or abandonment of such property if any of these acts are done in the receipt or expectation of profit, benefit, or advantage to the actor or to any other person directly or indirectly connected with himself. The expectation of profit need not be founded on contract; it is enough if the prohibited act be done for the purpose, or in the hope, of benefit or advantage, pecuniary or otherwise.

PROOF.

(*a*) That the accused has disposed of, dealt in, received, etc., certain public or private captured or abandoned property.

(*b*) That by so doing the accused received or expected some profit or advantage to himself or to a certain person connected in a certain manner with himself.

II. FAILURE OR DELAY IN REPORTING THE RECEIPT OF CAPTURED OR ABANDONED PROPERTY.

Proper authority is any authority competent to order the disposition of the property in question, and the required report should be direct or through such channels as the customs and rules of the service prescribe.

PROOF.

(*a*) That certain captured or abandoned property came into the possession, custody, or control of the accused.

(*b*) Acts or omissions of the accused which evidence his failure in reporting the receipt of, and in turning over without delay, such property to proper authority.

431. *Eighty-first Article of War:*

Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or military commission may direct.

DEFINITIONS AND PRINCIPLES.

"Enemy" imports enemy citizens as well as soldiers and does not restrict itself to the enemy government or its army. All the citizens of one belligerent are enemies of the Government and of all the citizens of the other.

ANALYSIS AND PROOF.

This article describes, in nearly every phrase, an overt act of treason. The word whosoever, as it is here used, subjects to the jurisdiction of courts-martial and military commissions all persons, either military or civil, who, in the theater of operations and during the continuance of war, traffic with the enemy in any of the ways herein denounced.

The article defines five offenses:
I. Relieving the enemy.
II. Attempting to relieve the enemy.
III. Harboring or protecting the enemy.
IV. Holding correspondence with the enemy.
V. Giving intelligence to the enemy.

I. RELIEVING THE ENEMY.

"Relieves," in the sense here used, is substantially equivalent to furnishes or supplies. It is immaterial whether the articles furnished are needed by the enemy or whether the transaction is a donation or sale. Knowledge or intent is not an essential in proof of this offense.

PROOF.

(*a*) That the accused either directly or indirectly furnished the enemy with a certain article or articles.

II. Attempting to Relieve the Enemy.

As to the meaning of "attempting" see paragraph 426, supra, under A. W. 76.

PROOF.

That the accused committed some act done with the purpose in view of either directly or indirectly furnishing the enemy with a certain article or articles, whether or not the articles actually reached the enemy.

III. HARBORING OR PROTECTING THE ENEMY.

An enemy is harbored or protected when he is shielded either physically or by use of any artifice, aid, or representation from any injury or misfortune which in the chance of war may befall him. It must appear that the offense is knowingly committed. But, as in all other cases where knowledge must be proved, circumstances sufficient to put a reasonable man on notice will be sufficient to charge the accused with notice.

PROOF.

(*a*) That the accused harbored or protected a certain person.

(*b*) That the person so protected was an enemy, and that the accused had notice or is chargeable with notice of this fact.

IV. HOLDING CORRESPONDENCE WITH THE ENEMY.

Correspondence does not necessarily import a mutual exchange of communication. The rule requires absolute non-intercourse, and any communication, no matter what may be its tenor or intent, is here denounced. The prohibition lies against any method of communication whatsoever, from the winking of an eye to the sending of script, and the offense is complete the moment the communication emanates from the accused whether it reaches its destination or not. The words "directly or indirectly" are construed as applying to this offense, and they include within the prohibition communications printed in newspapers and intended for the enemy and communications conveyed to the enemy through friendly or neutral hands. It is essential to prove that the offense was knowingly committed.

Citizens of neutral powers resident in or visiting invaded or occupied territory can claim no immunity from the customary laws of war which threaten punishment for communication with the enemy. The offense of communicating with the enemy when committed by a resident of occupied territory constitutes war treason and is properly charged under this article.

PROOF.

(*a*) That the accused uttered a certain communication.

(*b*) That the communication was intended for a certain person, and that the accused had notice or is chargeable with notice that this person was an enemy.

V. GIVING INTELLIGENCE TO THE ENEMY.

This is a particular case of corresponding with the enemy, rendered more heinous by the fact that the communication

contains intelligence that may be useful to the enemy for any of the multifarious reasons that make information valuable to belligerents. As in the preceding case, knowledge must be proved, and it is immaterial to the issue of guilt whether the intelligence was conveyed by direct or indirect means. The word "intelligence" imports that the information conveyed is true, at least in part.

(*a*) That the accused knowingly conveyed to the enemy certain information.

(*b*) That the information was true, at least in part.

432. *Eighty-second Article of War:*

Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.

DEFINITIONS AND PRINCIPLES.

See below.

ANALYSIS AND PROOF.

The words "any person" bring within the jurisdiction of courts-martial and military commissions all persons of whatever nationality or civil status who may be accused of the offense denounced by the article.

The article defines one crime—being a spy.

I. BEING A SPY.

The principal characteristic of this offense is a clandestine dissimulation of the true object sought, which object is an endeavor to obtain information with the intention of communicating it to the hostile party.

Thus, soldiers not wearing disguise, dispatch riders, whether soldiers or civilians, and persons in aircraft who carry out their missions openly and who have penetrated hostile lines are not to be considered spies, for the reason that, while they may have resorted to concealment, they have practiced no dissimulation.

It is necessary to prove an intent to communicate information to the hostile party. This intent will very readily be presumed on proof of a deceptive insinuation of the accused among our forces, but this presumption may be rebutted by very clear evidence that the person had come within the lines for a comparatively innocent purpose, as to visit his family or that he has assumed a disguise to enable him to reach his own lines.

It is not essential that the accused obtain the information sought or that he communicate it. The offense is complete with the lurking or dissimulation with intent to accomplish these objects.

An act of espionage completed by the escape of the accused to his own lines can not be the subject of trial if the quondam spy is later captured.

A person living in occupied territory who, without dissimulation, merely reports what he sees or what he hears through agents to the enemy may be charged under the preceding article with communicating or giving intelligence to the enemy, but he may not be charged under this article with being a spy.

PROOF.

(*a*) That the accused was found at a certain place within our lines, acting clandestinely, or under false pretenses.

(*b*) That he was obtaining, or endeavoring to obtain, information with intent to communicate the same to the enemy.

SECTION VI.

MISCELLANEOUS CRIMES AND OFFENSES.

433. *Eighty-third Article of War:*

Any person subject to military law who willfully, or through neglect, suffers to be lost, spoiled, damaged, or wrongfully disposed of, any military property belonging to the United States shall make good the loss or damage and suffer such punishment as a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

The loss, etc., may be said to be willfully suffered when the accused knowing the loss, etc., to be imminent or actually go-

ing on, takes no steps to prevent it, as where a sentinel seeing a small and readily extinguishable fire in a stack of hay on his post allows it to burn up. A suffering through neglect implies an omission to take such measures as were appropriate under the circumstances to prevent a probable loss, damage, etc.

The willful or neglectful sufferance specified by the article may consist in a deliberate violation or positive disregard of some specific injunction of law, regulations, or orders; or it may be evidenced by such circumstances as a reckless or unwarranted personal use of the property; causing or allowing it to remain exposed to the weather, insecurely housed or not guarded; permitting it to be consumed, wasted, or injured by other persons; loaning it to an irresponsible person by whom it is damaged, etc. (Winthrop, p. 862.)

ANALYSIS AND PROOF.

The article applies to any one subject to military law. See article 2.

The article embraces eight offenses, indicated by the following diagram:

Any person subject to military law who	Willfully or Through neglect	Suffers to be	Lost, Spoiled, Damaged, or Wrongfully disposed of	Any military property belonging to the United States.

These offenses may be briefly treated under the heading "Suffering military property to be lost, etc."

I. SUFFERING MILITARY PROPERTY TO BE LOST, ETC.

PROOF.

(*a*) That certain military property was lost, spoiled, damaged, or wrongfully disposed of in the manner alleged.

(*b*) That such loss, spoiling, damage, or wrongful disposition was suffered by the accused through a certain omission of duty on his part.

(c) That such omission was willful, or negligent, as alleged.

(*d*) The value of the property, as alleged.

434. *Eighty-fourth Article of War:*

Any soldier who sells or wrongfully disposes of or willfully or through neglect injures or loses any horse, arms, ammunition, accouterments, equipment, clothing, or other property issued for use in the military service shall be punished as a court-martial may direct.

Definitions and Principles.

See definitions under A. W. 80, paragraph 430, supra.

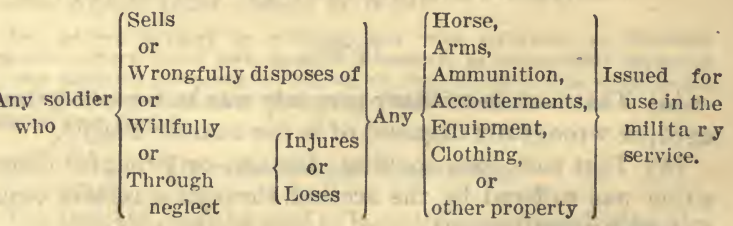
Accouterments applies in the military sense to those parts of the soldier's equipment which are issued by the Ordnance Department * * * in connection with his arms and ammunition, such, for example, as belts and cartridge pouches. (Digest, p. 1084.)

Clothing includes all articles of clothing whether issued under a clothing allowance or otherwise, for example, overcoats and sweaters as now issued are articles of clothing. That the property sold, disposed of, lost, or injured was issued to someone other than the accused is immaterial; the article applies to any property issued for use in the military service.

Analysis and Proof.

This article applies to enlisted men only.

The article defines a number of offenses, indicated by the following diagram:



These offenses may be treated under the following heads:

I. Selling or wrongfully disposing of military property.

II. Willfully or through neglect injuring or losing military property.

I. SELLING OR WRONGFULLY DISPOSING OF MILITARY PROPERTY.

See matter under A. W. 80, Item I.

PROOF.

(*a*) That the accused soldier sold or otherwise disposed of certain property in the manner alleged.

(*b*) That such disposition was wrongful.

(*c*) That the property was issued for use in the military service.

(*d*) The value of the property as alleged.

II. WILLFULLY OR THROUGH NEGLECT INJURING OR LOSING MILITARY PROPERTY.

A *willful injury* or *loss* is one that is *intentionally* occasioned. A loss or injury is occasioned through neglect when it is the result of a want of such attention to the nature or probable consequences of an act or omission as was appropriate under the circumstances.

PROOF.

(*a*) That certain property was injured in a certain way or lost, as alleged.

(*b*) That such property was issued for use in the military service.

(*c*) That such injury or loss was willfully caused by the accused in a certain manner, as alleged; or that such injury or loss was the result of certain neglect on the part of the accused.

(*d*) The value of the property, as alleged.

435. *Eighty-fifth Article of War:*

Any officer who is found drunk on duty shall, if the offense be committed in time of war, be dismissed from the service and suffer such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall be punished as a court-martial may direct. Any person subject to military law, except an officer, who is found drunk on duty shall be punished as a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

The article does not require that the accused shall have become drunk, but that he shall have been found, i. e., discovered or perceived, to be drunk, when on duty, and it does not therefore necessarily follow that his drunkenness shall have commenced after the duty has been entered upon. To permit an officer or soldier, when inebriated, to go upon any duty of importance, while in general involving an injustice to the individual, is also a reprehensible act and a military offense in the superior who *knowingly* suffers it. But the fact that he was already intoxicated can not render the party himself any the less legally liable under the article, if, after having entered upon the duty, his intoxication continues and his condition is detected. But, on the other hand, a soldier (or officer) is not "found" drunk in the sense of the article, if he is simply discovered to be drunk when ordered, or otherwise required, to go upon the duty, upon which, because of his condition, he does not enter at all. (Winthrop, pp. 944, 945.)

Whether the drunkenness was caused by liquor or drugs is immaterial, but where the sole cause was a liquor or drug duly prescribed by a medical officer of the Army or a civil physician and taken in good faith according to the prescription no offense is committed.

The fact that the accused, owing to an unsuspected susceptibility, permanent or temporary, was made drunk by indulging in a very small amount of intoxicant is not a defense.

Any intoxication which is sufficient to sensibly impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the article. (Digest, p. 540.)

Where the accused is charged under this article, a conviction under the general article of *being under the influence of* liquor is wholly inconsistent if he was found in such condition while on duty. The article requires no particular degree of drunkenness, and if the accused was found so far under the influence of liquor as to be punishable at all he was found drunk on duty within the meaning of this article.

The term "duty" as used in this article, means of course military duty. But—it is important to note—every duty which an officer or soldier is legally required, by superior military authority, to execute, and for the proper execution of which he is answerable to such authority, is necessarily a military duty. (Winthrop, p. 949.)

The words "on duty," as used in this article, have also received an authoritative interpretation. As applied to the commanding officer of a post, or of an organization, or detachment in the field, the senior officer present, in the actual exercise of command, is constantly on duty; the term being here used in contradistinction to "on leave." In the case of other officers, or of enlisted men, the term "on duty" has been held to relate to the performance of duties of routine or detail, in garrison or in the field; the words "off duty," in respect to such persons, relating to such periods or occasions when, no duty being required of them by orders or regulations, officers and men are said to occupy that status of leisure known to the service as being "off duty." (Davis, p. 408.)

In time of war and in a region of active hostilities the circumstances are often such that all members of a command may properly be considered as being continuously on duty within the meaning of this article.

A medical officer of a post, where there are constantly sick persons under his charge who may at any moment require his attendance, may, generally speaking, be deemed to be "on duty" in the sense of the article during the whole day and not merely during the hours regularly occupied by sick call, visiting the sick, or attending hospital. If found drunk at any other hour he may in general be charged with an offense under this article. (Digest, p. 127.)

So, also, an officer of the day and members of the guard are on duty during their entire tour within the meaning of this article, but a sentinel found drunk on post is chargeable under the next succeeding article. The article also applies to cases where the duty being performed is merely a preliminary one, such as a reporting for inspection by a soldier designated for guard or a reporting under orders for duty at a post to the commanding officer.

The offense of a person who absents himself from his duty and is found drunk while so absent, or who is relieved from duty at a post and ordered to remain there to await orders, and is found drunk during such status, is not chargeable under this article.

Analysis and Proof.

This article applies to any person subject to military law. See article 2.

The article defines one offense, namely, being found drunk on duty.

I. BEING FOUND DRUNK ON DUTY.

PROOF.

(*a*) That the accused was on a certain duty, as alleged.
(*b*) That he was found drunk while on such duty.

436. *Eighty-sixth Article of War:*

Any sentinel who is found drunk or sleeping upon his post, or who leaves it before he is regularly relieved, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall suffer any punishment, except death, that a court-martial may direct.

Definitions and Principles.

As to drunkenness, see matter under eighty-fifth article, supra.

The term "sentinel" does not include a watchman.

A sentinel is on post within the meaning of this article not only when he is walking a duly designated sentinel's post, as is ordinarily the case in garrison, but also "when he may be stationed in observation against the approach of an enemy, or on post to maintain internal discipline, or to guard stores, or to guard prisoners while in confinement or at work." (Digest, p. 128.)

A sentinel's post is not limited to an imaginary line, but includes, according to orders or circumstances, such contiguous area within which he may walk as may be necessary for the protection of property committed to his charge or for the discharge of such other duties as may be required by general or special orders. The sentinel who goes anywhere within such area for the discharge of his duties does not leave his post, but if found drunk or sleeping within such area he may be convicted of a violation of this article.

The fact that the sentinel was not posted in the regular way is not a defense.

Analysis and Proof.

The article applies only to sentinels.

The article defines three offenses, namely:

I. Being found drunk on post.

II. Being found sleeping on post.

III. Leaving post before being relieved.

I. BEING FOUND DRUNK ON POST.

As to drunkenness, see matter under eighty-fifth article, paragraph 435, supra.

PROOF.

(*a*) That the accused soldier was posted as a sentinel on a certain post, as alleged.

(*b*) That he was found drunk while on such post.

II. BEING FOUND SLEEPING ON POST.

The fact that the accused had been previously overtaxed by excessive guard duty is not a defense, although evidence to that effect may be received in extenuation of the offense.

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PROOF.

(*a*) That the accused soldier was posted as a sentinel on a certain post, as alleged.

(*b*) That he was found sleeping while on such post.

III. LEAVING POST BEFORE BEING RELIEVED.

The offense of leaving post is not committed when a sentinel goes an immaterial distance from the point, path, area, or object which was prescribed as his post.

PROOF.

(*a*) That the accused soldier was posted as a sentinel on a certain post, as alleged.

(*b*) That he left such post without being regularly relieved.

437. *Eighty-seventh Article of War:*

Any officer commanding in any garrison, fort, barracks, camp, or other place where troops of the United States may be serving who, for his private advantage, lays any duty or imposition upon or is interested in the sale of any victuals or other necessaries of life brought into such garrison, fort, barracks, camp, or other place for the use of the troops, shall be dismissed from the service and suffer such other punishment as a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

See the terms of the article.

ANALYSIS OF PROOF.

This article applies to commanding officers only.

The article defines offenses which may be treated under two heads, as follows:

I. Laying a duty or imposition upon the bringing in of victuals, etc.

II. Being interested in the sale of victuals, etc.

I. LAYING A DUTY OR IMPOSITION UPON THE BRINGING IN OF VICTUALS, ETC.

A commanding officer who should prohibit the entry into his camp of peddlers of vegetables for the troops, permitting it only if the peddlers pay him for the privilege, would be guilty of this offense whether any money was actually paid or not.

PROOF.

(*a*) That the accused officer was in command of a certain place where troops of the United States were serving, as alleged.

(*b*) That he laid a certain duty or imposition upon the bringing into such command of victuals or other necessaries of life for the use of such troops, as alleged.

(*c*) That such duty or imposition was laid for his own private advantage.

II. BEING INTERESTED IN THE SALE OF VICTUALS, ETC.

The interest need not be a direct interest, such as that attaching to a partnership, or part ownership, of the articles introduced for sale, but may be one of an indirect or contingent character, as for instance, an interest arising from an agreement or mutual understanding between the officer and the owner of the supplies that the former shall receive a percentage on the sales, or a commission on all profits above a certain sum, or some present of money or goods in return for his sanction of the speculation or promotion of the business. (Winthrop, p. 870.)

Thus a commanding officer commits this offense when he agrees with a peddler to exclude others in consideration of some advantage to himself.

A commanding officer might become interested in the sale of articles by the post exchange within the meaning of this article.

PROOF.

(*a*) That the accused officer was in command of a certain place where troops of the United States were serving, as alleged.

(*b*) That he became pecuniarily interested in a certain way in the sale of certain victuals or other necessaries of life to such troops, as alleged.

(*c*) The he so became interested for his own private advantage.

438. *Eighty-eighth Article of War:*

Any person subject to military law who abuses, intimidates, does violence to, or wrongfully interferes with any person bringing provisions, supplies, or other necessaries to the camp, garrison, or quarters of the forces of the United States shall suffer such punishment as a court-martial may direct.

Definitions and Principles.

See the terms of the article.

This article in no way interferes with the lawful powers of a military commander to exclude persons or supplies inimical to health or good order of his command. The purpose of this article is to prevent the diminishing or cutting off of the supply of necessaries brought in by private persons through any abuse, intimidation, doing violence to, or wrongfully interfering with such persons. The prohibition against interference, etc., therefore, applies not only while such persons are coming to the camp, etc., but also while they remain and during their return therefrom.

The wrongful interference contemplated would include not only any wrongful act not included in the terms "abuse, etc.," which prevents, obstructs, or delays the movements of the person, but any wrongful interference with the supplies themselves, such as stealing or destroying them.

Analysis and Proof.

This article applies to any person subject to military law. The article defines a number of offenses which may be briefly treated under one head, as follows:

I. INTIMIDATING, DOING VIOLENCE TO, OR WRONGFULLY INTERFERING WITH PERSONS BRINGING NECESSARIES.

PROOF.

(*a*) That a certain person named or described was bringing provisions, supplies, or other necessaries to a certain

camp, garrison, or quarters of the forces of the United States, as alleged.

(*b*) That the accused abused, intimidated, did violence to, or wrongfully interfered with such person while so engaged and in the manner alleged.

439. *Eighty-ninth Article of War:*

All persons subject to military law are to behave themselves orderly in quarters, garrison, camp, and on the march; and any person subject to military law who commits any waste or spoil, or willfully destroys any property whatsoever (unless by order of his commanding officer), or commits any kind of depredation or riot shall be punished as a court-martial may direct. Any commanding officer who, upon complaint made to him, refuses or omits to see reparation made to the party injured, in so far as the offender's pay shall go toward such reparation, as provided for in article one hundred and five, shall be dismissed from the service, or otherwise punished, as a court-martial may direct.

Definitions and Principles.

See the terms of the article and the definitions under the respective offenses as given below.

Analysis and Proof.

This article divides itself into two parts, one embracing all persons subject to military law, and the other commanding officers only.

The article defines a number of offenses which may be briefly treated under the following headings:

I. Committing any waste or spoil.
II. Willfully destroying property.
III. Committing depredation or riot.
IV. Refusing or omitting to see reparation made.

I. COMMITTING ANY WASTE OR SPOIL.

The terms "waste" or "spoil" as used in this article refer to such acts of voluntary destruction of or permanent damage to real property as burning down buildings, tearing down fences, cutting down shade or fruit trees, and the like.

PROOF.

(*a*) That the accused being with a certain command in quarters, camp, garrison, or on the march, committed waste or spoil on certain property in the manner alleged.

(*b*) That such acts were not ordered by his commanding officer.

II. WILLFULLY DESTROYING PROPERTY.

To be destroyed it is not necessary that the property be completely demolished or annihilated. It is sufficient if it is so far injured as to be useless for the purpose for which it was intended.

PROOF.

(*a*) That the accused being with a certain command in quarters, camp, garrison, or on the march, destroyed certain property, as alleged.

(*b*) That such destruction was willful and was not ordered by his commanding officer.

III. COMMITTING DEPREDATION OR RIOT.

The term "any kind of depredation" includes plundering, pillaging, robbing, and any other willful damage to property not included in the preceding specific terms of the article.

A riot is a tumultuous disturbance of the peace by three or more persons assembled together of their own authority, with the intent mutually to assist one another against anyone who shall oppose them in the execution of some enterprise of a private nature, and who afterwards actually execute the same in a violent and turbulent manner, to the terror of the people, whether the act intended was of itself lawful or unlawful. (McClain, Crim. Law, sec. 992.)

PROOF.

(*a*) That the accused being with a certain command in quarters, camp, garrison, or on the march, committed certain acts of depredation on certain property, or certain acts of rioting, as alleged.

IV. REFUSING OR OMITTING TO SEE REPARATION MADE.

Refusing to entertain a proper complaint at all; refusing or omitting to convene a board for the assessment of damage; or to act on such proceedings, or to direct the proper stoppages, are instances of this offense.

PROOF.

(*a*) That the accused was the commanding officer of a certain command in quarters, garrison, camp, or on the march, as alleged.

(*b*) That a complaint was duly made to him by a certain person of damage to or loss of certain property occasioned by troops of the accused's command, as alleged.

(*c*) That the accused either refused to see reparation made or omitted in the manner alleged to see reparation made to the party injured in so far as the offender's pay would go toward such reparation.

440. *Ninetieth Article of War:*

No person subject to military law shall use any reproachful or provoking speeches or gestures to another; and any person subject to military law who offends against the provisions of this article shall be punished as a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

See the terms of the article.

The article is intended to prevent what frequently are the first steps toward quarrels, fights, or serious offenses.

Reproachful speeches and gestures are such as involve censorious comment on the actions or opinions of another. Provoking speeches and gestures are such as tend to exasperate or to arouse anger and resentment.

ANALYSIS AND PROOF.

This article applies to any person subject to military law. The article defines offenses which may be treated under one heading, as follows:

I. USING PROVOKING SPEECHES OR GESTURES.

PROOF.

(*a*) That the accused used certain speeches or gestures to a certain person, as alleged.

(*b*) That the speeches or gestures were reproachful or provoking.

(*c*) That the person to whom such speeches or gestures were addressed is in one of the classes of persons subject to military law.

441. *Ninety-first Article of War:*

Any person subject to military law who fights or promotes or is concerned in or connives at fighting a duel, or who having knowledge of a challenge sent or about to be sent fails to report the fact promptly to the proper authority shall, if an officer, be dismissed from the service or suffer such other punishment as a court-martial may direct; and if any other person subject to military law, shall suffer such punishment as a court-martial may direct.

Definitions and Principles.

See the terms of the article.

A duel is a concerted fight between two persons with deadly weapons, the object of which is claimed to be the satisfaction of wounded honor. (Wharton, vol. 2, p. 2283.)

Note.—The offenses made punishable by this article are of such infrequent occurrence that it is considered inadvisable to comment more fully upon them. In a case of doubt, works on military law should be consulted.

Analysis and Proof.

This article applies to any person subject to military law.

The article embraces a number of offenses which may be briefly treated under the following headings:

I. Fighting or promoting a duel.

II. Being concerned in or conniving at fighting a duel.

III. Failing to report knowledge of a challenge.

I. FIGHTING OR PROMOTING A DUEL.

Fighting or promoting a duel would include such acts as the sending, giving, or accepting a challenge, or the carrying of a challenge or acceptance, the arrangement of the preliminaries, and, in general, any act by which a duel is intentionally furthered, encouraged, or incited, whether the duel takes place or not.

PROOF.

(*a*) That the accused fought a duel with a certain person as alleged, or that he promoted a duel between certain persons in the manner alleged.

II. BEING CONCERNED IN OR CONNIVING AT FIGHTING A DUEL.

Being concerned in or conniving at fighting a duel would include the being present thereat in some capacity other than a principal, as in the case of seconds and doctors.

PROOF.

(*a*) That the accused was concerned in or connived at fighting a certain duel in the manner alleged.

III. FAILING TO REPORT KNOWLEDGE OF A CHALLENGE.

A challenge is a written or verbal demand, request, or invitation to another to fight a duel.

To constitute a challenge no particular form is necessary. It is enough if what was sent or about to be sent, considered in connection with the circumstances, amounts to such a demand, request, or invitation. However, an effort to provoke a challenge or an announcement of a willingness to accept one is not a challenge.

As to knowledge, see matter under fifty-fifth article.

PROOF.

(*a*) That the accused knew that a certain challenge had been sent, or was about to be sent, as alleged.

(*b*) That he either did not report the fact to the proper authority at all, or that he unnecessarily delayed making such report, as alleged.

442. *Ninety-second Article of War:*

Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

Definitions and Principles.

The crimes and offenses of which courts-martial are given jurisdiction by the ninety-second and ninety-third articles of war, and by the phrase "and all crimes or offenses not capital" in the ninety-sixth article, are the same "offenses of a civil nature" mentioned in the forty-second article of war. Their definition is, therefore, to be sought, as the forty-second article prescribes, (1) in the "statutes of the United States of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910;" and (2) where not defined in such statutes then "in the law of the District of Columbia," i. e., if defined by a statute in force in the District of Columbia, e. g., the Code of the District of Columbia, then in that statute, otherwise in the common law as in force and recognized in the District of Columbia. Where an offense is defined by the Federal Penal Code or other statute of general application throughout the continental United States, such definition will govern courts-martial and military tribunals, although there may be a different definition in the Code of the District of Columbia; the principle being that, wherever the general statutes conflict with any statute of the District of Columbia, the latter must give way, since resort is to be had to the law of the District of Columbia only where the general Federal statutes are silent.

Analysis and Proof.

The article applies to any person subject to military law. See article 2.

The article defines two offenses, as follows:

I. Murder.

II. Rape.

I. MURDER.

Murder is the unlawful killing of a human being with malice aforethought. (Federal Penal Code, 1910, sec. 273.)

"Unlawfully" as used in the definition of murder means without legal justification or excuse.

A homicide done in the proper performance of a legal duty is justifiable. Thus, executing a person pursuant to a sen-

tence of death; killing in suppressing a mutiny or in preventing the escape of a prisoner where no other available means are adequate; killing an enemy in battle; and killing to prevent the commission of a felony attempted by force or surprise, such as murder, burglary, or arson, are cases of justifiable homicide.

The right and duty of a sentinel over a prisoner in his charge in case of attempted escape is discussed in the Manual of Interior Guard Duty, 1914.

This right and duty extends to other members of the guard whose duties include the safe-keeping of such prisoner. (Digest, p. 583.)

The same principles apply to the arrest of a soldier by officers or soldiers authorized to make the particular arrest.

A party of soldiers left their camp at night in time of war without leave contrary to positive orders and proceeded to a neighboring town, where they created a disturbance. Their commanding officer followed them, found them in a saloon, and was about to arrest them, when they broke from him, and knowing who he was disregarded his order to halt and ran away from him. He repeated his order, and not being obeyed and having no other means of detaining them, fired upon them while fleeing with a pistol, and shot and killed one of them. *Held*, that he did not use undue force in endeavoring to maintain discipline and to arrest the offenders whom he was endeavoring to return to their stations, and that he was not guilty of an offense requiring punishment, and that his conduct under the circumstances in which he was placed was justified. (Digest, p. 480.)

The general rule is that "The acts of a subordinate officer or soldier, in compliance with his supposed duty, or of superior orders, are justifiable, and he will be protected against the consequences, unless they are manifestly beyond the scope of his authority, and such that a man of ordinary sense and understanding would know to be illegal, where he acts in good faith and without malice." (Wharton on Homicide, 3d ed., p. 731.)

The foregoing principles should not be construed as conferring immunity on an officer or soldier who willfully or

through culpable negligence does acts endangering the lives of innocent third parties in the discharge of his duty to prevent escape or effect an arrest.

But where a guard fired on a prisoner fleeing down a public street which was apparently clear, under circumstances that would have justified the homicide of the prisoner, and thereby accidentally killed a young woman whom he did not see at the time he shot, it was held that the homicide was excusable.

A homicide which is the result of an accident or misadventure in doing a lawful act in a lawful manner, or which is done in self-defense on a sudden affray, is excusable. Thus, where a lawful operation, performed with due care and skill, causes the death of the patient, the homicide is excusable. To excuse a killing on the ground of self-defense upon a sudden affray, the killing must have been necessary to save the person's life or the lives of those whom he is bound to protect, or to prevent great bodily harm to himself or them. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can. The person doing the killing must not have been the aggressor and intentionally provoked the difficulty; but if he withdraws in good faith and his adversary follows and renews the fight, the latter becomes the aggressor.

The death must take place within a year and a day of the act or omission that caused it, and the offense is committed at the place of such act or omission although the victim may have died elsewhere.

Malice does not necessarily mean hatred or personal ill will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word "aforethought" does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark, pp. 187, 188.)

Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states

of mind preceding or coexisting with the act or omission by which death is caused; (*a*) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); (*b*) knowledge that the act which causes the death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused; (*c*) intent to commit any felony; (*d*) an intent to oppose force to an officer or other person lawfully engaged in the duty of arresting, keeping in custody, or imprisoning any person, or the duty of keeping the peace, or dispersing an unlawful assembly, provided the offender has notice that the person killed is such officer or other person so employed. (Clark p. 187.)

PROOF.

(*a*) That the accused killed a certain person named or described by certain means, as alleged. This involves proof—

(1) That the person alleged to have been killed is dead.

(2) That he died in consequence of an injury received by him.

(3) That such injury was the result of the act of the accused.

(4) That the death took place within a year and a day of such act.

(*b*) That such killing was with malice aforethought; that is, that the accused was in one or more of the states of mind described above.

II. RAPE.

Rape at common law is the having of unlawful carnal knowledge of a woman by force and without her consent. The Federal Penal Code provides (Federal Penal Code, 1910, sec. 278), "Whoever shall commit the crime of rape shall suffer death"; but does not define the crime, thereby adopting the common law definition, which governs courts-martial.

As the carnal knowledge must be unlawfully had, a husband who has carnal knowledge of his wife forcibly where she does not consent is not guilty of this offense; but he is guilty when he assists another man in having such carnal knowledge.

Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.

The offense may be committed on a female of any age, on a man's mistress, or on a common harlot.

Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient force where there is in fact no consent.

Where there is actual consent to the connection, though such consent be obtained by fraud, there is no rape; thus, where a woman agrees to connection with a physician on his false representation that the act is part of the required treatment, or where a man successfully passes himself off to a woman as her husband and is admitted by her to connection as such, the crime of rape is not committed.

There is no consent where the woman is so idiotic as to be incapable of consenting, and a man having connection with her not believing that he has her consent is guilty of rape. So also where the woman is insensible, unconscious, or asleep, or where her apparent consent was extorted by violence to her person or fear of sudden violence.

Mere verbal protestations and a pretense of resistance do not of course show a want of consent, but the contrary, and where a woman fails to take such measures to frustrate the execution of the man's design as she is able to, and are called for by the circumstances, the same conclusion may be drawn.

If the girl is very young, and not enlightened on the question, the court will demand less clear opposition than in the case of an older and intelligent female. (Bishop's New Criminal Law, sec. 1124, subsec. 1.)

It has been said of this offense that "it is true that rape is a most detestable crime * * *; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent."

PROOF.

(*a*) That the accused had carnal knowledge of a certain female, as alleged;

(*b*) That the act was done by force and without her consent.

NOTE.—As to carnal knowledge of a female under the age of consent, see under A. W. 96, par. 446, Division III (4), infra.

443. *Ninety-third Article of War:*

Any person subject to military law who commits manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, embezzlement, perjury, forgery, sodomy, assault with intent to commit any felony, assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing, or assault with intent to do bodily harm, shall be punished as a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

See matter under several offenses listed in the article. And see the remarks under "Definitions and Principles," paragraph 442, supra, concerning the definitions of offenses under A. W. 92, 93, and 96.

ANALYSIS AND PROOF.

This article applies to any person subject to military law. The article embraces the following offenses, namely:

I. Manslaughter.
II. Mayhem.
III. Arson.
IV. Burglary.
V. Housebreaking.
VI. Robbery.
VII. Larceny.
VIII. Embezzlement.
IX. Perjury.
X. Forgery.
XI. Sodomy.
XII. Assault with intent to commit any felony.
XIII. Assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing.
XIV. Assault with intent to do bodily harm.

I. MANSLAUGHTER.

Manslaughter at common law is unlawful homicide without malice aforethought and is either voluntary or involuntary.

The Federal Penal Code provides (Federal Penal Code, 1910, sec. 274), "Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

"First—Voluntary.—Upon a sudden quarrel or heat of passion.

"Second—Involuntary.—In the commission of an unlawful act not amounting to a felony, or the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

This statutory definition governs courts-martial. It is, however, declaratory of the common law, to which, therefore, reference may be had for the principles underlying the statutory definitions.

In voluntary manslaughter the provocation must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man; the act must be committed under and because of the passion, and the provocation must not be sought or induced as an excuse for killing or doing bodily harm. (Clark, p. 197.)

The killing may be manslaughter only, even if intentional; but where sufficient cooling time elapses between the provocation and the blow the killing is murder, even if the passion persists. Instances of adequate provocation are: Assault and battery, inflicting actual bodily harm or a gross insult; an unlawful imprisonment; and the sight by a husband of an act of adultery committed by his wife. If the person so assaulted or imprisoned, or the husband so situated at once kills the offender or offenders in a heat of a sudden passion caused by their acts, manslaughter only has been committed.

Instances of inadequate provocation are: Knowledge by the brother of a female of her seduction; insulting or abusive words or gestures; and injuries to property.

In involuntary manslaughter in the commission of an unlawful act the act must be malum in se and not merely malum prohibitum. Thus the driving of an automobile in slight

excess of the speed limit fixed by ordinance is not the kind of unlawful act contemplated, but voluntarily engaging in an affray is such an act. To use an immoderate amount of force in suppressing a mutiny is an unlawful act, and if death is caused thereby the one using such force is guilty of manslaughter at least,

Instances of culpable negligence in performing a lawful act are: Negligently conducting target practice so that the bullets go in the direction of an inhabited house within range; pointing a pistol in fun at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be discharged; carelessly leaving poisons or dangerous drugs where they may endanger life.

Instances of culpable negligence in performing an act required by law are: Gross negligence or inattention by those in charge of controlling or operating trains in the discharge of their duties; culpable failure on the part of a parent to provide food, shelter, and medical attendance for his helpless child where able to do so.

Where there is no legal duty to act there can, of course, be no neglect. Thus where a stranger makes no effort to save a drowning man, or a person allows a mendicant to freeze or starve to death, no crime is committed.

PROOF.

(*a*) See item (*a*) under "Proof of murder" under ninety-second article.

(*b*) The facts and circumstances of the case, as alleged, indicating that the homicide amounted in law to manslaughter.

II. MAYHEM.

The Federal Penal Code does not recognize the crime of mayhem. (The offense of "maiming," denounced by section 283, Federal Penal Code, is a different offense; see par. 446, infra, "maiming.") The Code of the District of Columbia prescribing a punishment for mayhem (D. C. Code, sec. 807) does

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not define the offense, thereby adopting the common-law definition, which will govern courts-martial.

Mayhem at common law is "a hurt of any part of a man's body whereby he is rendered less able, in fighting, either to defend himself or to annoy his adversary." (Bishop, vol. 2, p. 579.)

The offense at common law did not include such injuries which merely disfigure, such as cutting off the nose or ear; but did include such injuries as knocking out a front tooth, or castration, which were supposed to weaken a man's fighting ability.

The injury must be willfully and maliciously done, but need not be premeditated. If the hurt is done under circumstances which would excuse or justify a homicide, no offense is committed.

A person inflicting such a hurt upon himself is guilty of this offense, and if another does it at his request, both are so guilty.

PROOF.

(*a*) That the accused inflicted on a certain person a certain injury in the manner alleged.

(*b*) The facts and circumstances of the act showing such injury to have been inflicted intentionally and maliciously.

III. ARSON.

Arson, at the common law, is the malicious burning of another's house. (Bishop, vol. 2, p. 5.)

The Federal Penal Code provides (Federal Penal Code, 1910, sec. 285), "whoever shall willfully and maliciously set fire to, burn, or attempt to burn, or by means of a dangerous explosive destroy, or attempt to destroy, any dwelling house, or any store, barn, stable, or other building, parcel of a dwelling house, shall be imprisoned not more than twenty years."

The crime denounced in this statute, which governs courts-martial, is substantially the common law crime of arson (U. S. v. Cardish, 143 Fed., 640), and is the crime punishable as such under A. W. 93.

The house must be the dwelling house of another, as the offense is against the habitation, not against property as such.

The term "dwelling house" includes, as laid down in the Federal statute quoted, outbuildings that form part of the cluster of buildings used as a residence. A mere scorching is not a burning. To constitute a burning some part, however small, of the house must be actually consumed or disintegrated by charring or by a blaze.

A shop or store is not the subject of arson unless occupied as a dwelling. It is not arson to burn a house that has never been occupied or which has been permanently abandoned; but it is arson if the occupant is merely temporarily absent. It is not arson to burn one's own dwelling, whoever owns it, or even the dwelling of another at his request, and this is so even if there is an intent to burn an adjoining house belonging to a third party; but it is arson if such house is actually burned. A house occupied by another than the owner is a subject of arson by the owner.

The burning must be willful and malicious, which excludes a burning arising from negligence or mischance, unless the accused was engaged in the commission of a felony. Where a man, who, in setting fire to his own house to get the insurance, burns his neighbor's, he is guilty of arson in burning the neighbor's house.

PROOF.

(*a*) That the accused either:

(1) burned,
(2) set fire to,
(3) attempted to burn,
(4) destroyed by means of a dangerous explosive, or
(5) attempted to destroy by means of a dangerous explosive,

a certain dwelling house of another, as alleged.

(*b*) Facts and circumstances indicating that the act was willful and malicious.

NOTE.—The offense of burning other buildings, denounced by section 286, Federal Penal Code, is not arson, but another offense (U. S. v. Cardish, 143 Fed., 640), and is not punishable under A. W. 93, but under A. W. 96. (See par. 446, infra.)

IV. BURGLARY.

Burglary is not defined either by the Federal Penal Code or by the Code of the District of Columbia. Therefore the offense made punishable under that name by A. W. 93 is the common law crime of burglary.

Burglary at common law is the breaking and entering, in the night, of another's dwelling house, with intent to commit a felony therein. (Bishop, vol. 2, p. 56.)

To constitute burglary the house must be a dwelling house of another, the term "dwelling house" including outhouses, within the curtilage or the common inclosure; there must be an actual breaking, or there must be the constructive breaking involved where an entry is effected by fraud or false pretenses, by intimidation, by conspiracy with a servant or other inmate, or by descent of a chimney; there must be an entry; the breaking and entry must both be at night, but not necessarily on the same night; and there must be an intent to commit a felony in the house at the time of the breaking and of the entering, but the felony need not be committed. (Clark and Marshall, pp. 595, 596.)

A store is not a subject of burglary unless part of or used also as a dwelling house, as where the occupant uses another part of the same building as his dwelling; or where the store is habitually slept in by his servants or members of his family.

The house must be in the status of being occupied at the time of the breaking and entering. It is not necessary to this status that anyone actually be in it; but if the house has never been occupied at all or has been left without any intention of returning to it this status does not exist. Separate dwellings within the same building, as a flat in an apartment house or a room in a hotel, are subjects of burglary by other tenants or guests, and in general by the owner of the building himself. At common law a tent is not a subject of burglary.

There must be a breaking, actual or constructive. Merely to enter through a hole left in the wall or roof or through an open window or door, even if left only slightly open and pushed farther open by the person entering, will not consti-

tute an actual breaking; but where there is any removal of any part of the house designed to prevent entry, other than the moving of a partly open door or window, it is sufficient. Thus opening a closed door or window or other similar fixture, or cutting out the glass of a window or the netting of the screen is a sufficient breaking. So also the breaking of an inner door by one who has entered the house without breaking, or by a servant lawfully within the house, but who has no authority to enter the particular room, is a sufficient breaking, but unless such a breaking is followed by an entry into the particular room with intent to commit a felony therein, burglary is not committed.

There is a constructive breaking when the entry is gained by a trick, such as concealing oneself in a box; or under false pretense, such as personating a gas or telephone inspector; or by intimidating the inmates through violence or threats into opening the door; or through collusion with a confederate, an inmate of the house; or by descending a chimney, even if only a partial descent is made, and no room is entered. An entry must be effected before the offense is complete; but the entry of any part of the body, even a finger, is sufficient; and an insertion into the house of an instrument, except merely to facilitate further entrance, is a sufficient entry.

Both the breaking and entry must be in the nighttime, which at common law was the period between sunset and sunrise, when there is not sufficient daylight to discern a man's face, and both must be done with the intent to commit a felony in the house. It is immaterial whether the felony be committed or even attempted, and where a felony is actually intended it is no defense that its commission was impossible. The felony intended may be a statutory felony.

PROOF.

(*a*) That the accused broke and entered a certain dwelling house of a certain other person, as specified.

(*b*) That such breaking and entering was done in the nighttime.

(*c*) The facts and circumstances of the case (for instance, the actual commission of the felony) which indicate that

such breaking and entering were done with the intent to commit the alleged felony therein.

NOTE.—When, in charging burglary, it is expected that the evidence will show that larceny was also committed, a separate specification charging larceny should always be inserted in the charges, so that, if the court does not find that a burglary has been committed, but that the accused is guilty of larceny, it can find the accused guilty of the larceny, or the reviewing authority can approve only so much of the findings of guilty as find the accused guilty of the larceny.

V. Housebreaking.

The common law does not recognize any offense known by the designation of "housebreaking." Such an offense is, however, recognized and made punishable by section 823 of the Penal Code of the District of Columbia which was in force at the time of the enactment of the revision of the Articles of War of 1920, and is the offense made punishable as "housebreaking" by the ninety-third article of war.

Section 823, Penal Code of the District of Columbia, provides:

Housebreaking.—Whoever shall, either in the night or in the day time, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other water craft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

The offense is akin to burglary at common law, but differs therefrom principally in these five particulars:

(1) The house is not required to be a dwelling house; but may be a bank, store, or other building, boat, car, etc., named in the statute.

(2) It is not necessary that the house, bank, store, apartment, room, etc., be occupied at the time of the breaking and entering, or entering without breaking.

(3) It is not essential that there be a breaking, as an entry without breaking, if made with the required intent, also constitutes the offense.

(4) The breaking and entering, or the entry without breaking, may be either in the night or in the day time.

(5) The intent need not be to commit a felony, but may be (a) to commit any criminal offense (misdemeanor or felony), or (b) to break and carry away any part of the building (etc.) or any fixture or other thing attached to or connected with the same (but such intent is an essential element of the offense, and must therefore be alleged and proved, in order to support a conviction of this offense).

The caution in the Note under "burglary," supra, as to pleading, where larceny has actually been committed, applies here also.

PROOF.

(a) That the accused broke and entered, or entered without breaking, as alleged—

A dwelling,
A bank,
A store,
A warehouse,
A shop,
A stable,
A building of any other kind,
An apartment,
A room,
A steamboat,
A canal boat,
A vessel or other water craft,
A railroad car, or
A yard where any lumber or coal or other goods or chattels were at the time deposited and kept for the purpose of trade.

(b) The facts and circumstances of the case (as, for instance, the actual commission of a felony or of petit larceny) which indicate that the intent was, as alleged, to commit some criminal offense (whether felony or misdemeanor), or to break and carry away some part of the building, etc., or some fixture or other thing attached to or connected with the same.

VI. ROBBERY.

Section 284 of the Federal Penal Code of 1910 provides:

Whoever, by force and violence, or by putting in fear, shall feloniously take from the person or presence of another anything of value, shall be imprisoned not more than fifteen years.

This statute governs court-martial.

Robbery at common law is the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation. (Clark, p. 323.)

The felonious and forcible taking from the person of another goods or money to any value by violence or putting him in fear. (Bouvier's Law Dictionary, Rawle's 3rd Revision, vol. 3, p. 2971.)

Robbery includes larceny and the elements of that offense must always be present and must be alleged in the specification and proved at the trial. See matter under heading "VII" under this article.

Thus it is not robbery to take one's own property, unless the person from whom it is taken has a special property in the goods and the right to possession; nor is it robbery to take property that is honestly believed to be one's own or to take it for a merely temporary use.

It is not necessary that the person from whom the property is taken be the actual owner—it is enough if he have a possession or a custody that is good against the taker.

The property must be taken from the person or in his presence; but to be in the presence it is not necessary that the owner be within any certain distance of his property; it is enough if he be near enough to be in control of his property. Thus where some persons entered a house and forced the owner by threats to disclose the hiding place of valuables in an adjoining room, and then, leaving the owner tied, went into such room and stole the valuables their offense was held to be robbery.

The taking must be against the owner's will by means of violence or intimidation. The violence or intimidation must precede or accompany the taking. Thus where property is

taken by stealth from the person of its owner it is not robbery in case the thief overcomes a forcible effort to retake it; or the owner is deterred by the threats of the thief from making an attempt to retake it.

The violence must be actual violence to the person, but the amount of violence used is immaterial. It is enough where it overcomes the actual resistance of the person robbed, or puts him in such a position that he makes no resistance, or suffices to overcome the resistance offered by a chain or other fastening by which the article is attached to the person. Where an article is merely snatched out of another's hand or a pocket is picked by stealth and no other force is used and the owner is not put in fear, the offense is not robbery. But if in snatching the article resistance is overcome, there is sufficient violence, as where a woman's earring is torn from her ear or a hair ornament entangled in her hair is snatched away. So, also, when a person's attention is diverted by being jostled by a confederate of a pickpocket, who is thus enabled to steal the person's watch, it is a robbery.

Other instances of robbery by violence are where a man is knocked insensible and his pockets rifled, and where an officer steals property from the person of a prisoner in his charge after handcuffing him on the pretext of preventing his escape.

It is equally robbery whether the robber prevents resistance by rendering his victim physically incapable of making any, or by putting him, by threat or menaces, in such fear that he is warranted in making none. The fear must be a reasonably well-founded apprehension of present or future danger, and the goods must be taken while such apprehension exists. The danger apprehended may be, for instance, his own death or some bodily injury to him, or the destruction of his habitation, or a prosecution for sodomy.

In the last case it is immaterial whether the person threatened with the prosecution is innocent or guilty of the offense. A danger of being prosecuted for any other offense is held not to be sufficient. (Clark and Marshall, p. 556.)

When the evidence falls short of proving the force or fear, or other facts, necessary to robbery, the accused, by proper exceptions, may be found guilty of larceny, when properly alleged.

PROOF.

(*a*) The larceny of the property. See proof under larceny infra.

(*b*) That such larceny was from the person or in the presence of the person alleged to have been robbed.

(*c*) That the taking was by violence or putting in fear, as alleged.

VII. LARCENY.

Section 287 of the Federal Penal Code of 1910 provides:

Whoever shall take and carry away, with intent to steal or purloin, any personal property of another, shall be punished as follows: If the property taken is of a value exceeding fifty dollars, or is taken from the person of another, by a fine of not more than ten thousand dollars or imprisonment for not more than ten years, or both; in all other cases, by a fine of not more than one thousand dollars or by imprisonment not more than one year, or both. If the property stolen consists of any evidence of debt, or other written instrument, the amount of money due thereon, or secured to be paid thereby, and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property the title to which is shown thereby, or the sum which might be recovered in the absence thereof, shall be deemed to be the value of the property stolen.

This is substantially the common-law offense of larceny.

In larceny there must be a taking and carrying away. When actual physical possession is obtained and the property moved the least distance, the taking and carrying away is complete. Such possession must, however, be complete; thus, enticing a domestic animal a short distance, or seizing property secured by a chain, or causing another to drop property by knocking his hand is not a taking of such property. The taking need not be by the hands of the thief. Thus, where one, having the required intent to steal, entices a horse into his own stable without touching him, or procures an insane person to take the goods, or procures a railroad company to deliver another's trunk by changing the check on it, he is guilty of larceny.

The taking must be from the actual or constructive possession of the owner without his consent.

One who has a lawful right to the possession of the property of another can not steal it. Thus where an article is bor-

rowed or hired in good faith the bailee does not commit larceny if he subsequently during the bailment decides to and does convert the article to his own use. But if at the time the article is borrowed, etc., the borrower intends to convert it, such a taking is larceny. And where the possession of an article is obtained by fraud, although no intent to steal existed at the time, a subsequent forming and carrying out of such intent is a larceny. Thus acceptance of the possession, knowing of the mistake and with the required intent, is a larceny; but if he accepts it in ignorance of the mistake and in good faith as intended for him, his subsequent appropriating to his own use is not a larceny.

This same rule applies where a person is paid by mistake more money than he is entitled to.

The possession of goods may be in one person although the goods themselves be in the actual manual control of another, who is said to have the custody of them. Thus, where the owner of a coin gives it to a friend to examine on the spot, he still retains the possession, and if the recipient goes away with the coin intending to steal it he is guilty of larceny. So, too, a guest at a hotel or a private house has the bare custody of articles such as those in his room or given him for use at the table and can commit a larceny of such articles.

Where a servant receives goods or coins from his master to use, care for, or employ for a specific purpose in his service, the master retains possession and the servant has the custody only and may commit larceny of them. The fact of the existence of the relationship of master and servant does not prevent the latter from being a bailee of the former's property, in which case the rules as to bailees apply; for instance, a master might lend his servant a horse to use on the latter's own business. Where, however, a servant receives goods or coins from a third person on behalf of his master he has the possession of the goods or coins and can not commit a larceny of them until they have reached the possession of his master, which they do when delivered into his hands or deposited in the receptacle or place provided for the purpose. Thus, if a clerk receive some coins for his master in the course of business and place them in the cash drawer or safe belonging to

the master, he no longer has the possession of the coins and his taking of them with the requisite intent would be larceny; but he does not relinquish possession if, merely for his own convenience, he uses the safe or drawer as a hiding place. His subsequent taking of the coins would not, therefore, be larceny.

The distinction between custody and possession is of the utmost importance, for it is often very difficult to determine whether the crime is larceny or embezzlement, each particular case depending upon the peculiar circumstances. To illustrate the doctrine: Where a third person hands a clerk money to pay a bill which he owes the clerk's employer, and the clerk, instead of putting the money into his employer's safe or other proper place, puts it into his own pocket and appropriates it, or hides it on the premises and afterwards carries it off, he does not commit larceny, for, as the money has not reached its destination, but is merely in transit, the master has not obtained possession, either actual or constructive. If, however, the clerk puts the moneys in the safe, it is in his employer's constructive possession; and if he takes it out again and converts it, he is guilty of larceny. If it is not the duty of the clerk to put the money in the safe, but he is required to keep it on his person for his master, then, as soon as he received the money, it has reached its ultimate destination, and he will be guilty if he appropriates it, instead of holding it for his master. If a master gives his servant a check to take to the bank and get cashed he has mere custody of the check itself, and commits larceny if he appropriates it; but if he cashes the check and appropriates the money he commits embezzlement only, as the money has never been in the master's possession. (Clark, pp. 285, 286.)

Where the owner of an article delivers it to another, intending at the time an unconditional passing of the property as well as the possession, the other can not be guilty of larceny, whatever the inducement employed by him. Thus where property is obtained from a dealer on the false pretense of being sent for it by a regular charge customer, or where property is bought on credit with no intention of paying, or where a bogus check is given in payment of goods or in ex-

change for money, or where money is borrowed on false pretenses with the understanding that different coins or bills are to be returned, there is no larceny.

In the case of property delivered by servants or agents, such delivery can not go beyond the actual or apparent authority of the servant or agent. So where a master sends his servant with a c. o. d. package, and the purchaser induces the servant to give him the package without payment or pays with a worthless check, intending to keep the package, it is larceny.

The reason for the rule above stated, as to an intention to pass the property preventing the taking from amounting to larceny, is that the consent of the owner precludes the existence of an essential element of larceny. But where the taking overlaps the consent given, and where the other elements of larceny are present, he who does the taking is guilty of the offense. Thus where one gets candy from a slot machine by using a counterfeit coin, or where a customer after buying a cigar takes the whole box of matches provided by owner of the store for the use of his customer, the offenders are guilty of larceny if the other elements of that offense are present.

Another application of the rule that the consent must be as broad as the taking is made in cases where the owner's intent is to pass the property in the goods only when a condition is fulfilled. Thus where goods are handed to a purchaser on a cash sale the title is not intended to pass until the price is paid; and if the person receiving them runs off with the goods without paying for them and with the required intent he is guilty of larceny.

This rule applies in many analagous cases. For instance, it is larceny " for a man to whom money is handed to be changed to run off with it or keep it, animo furandi, and refuse to give the change, though the intention may be that he shall keep part of it as payment for goods purchased or as a loan, for there is no consent to part with the money without receiving the change." (Clark and Marshal, p. 467.) In these cases of conditional delivery the recipient has only the bare custody, and it is therefore immaterial whether the intent to steal existed at the time of the delivery, or was formed later.

The taking may be from any one having possession of the property; hence, property may be stolen from one who himself has stolen it, and the owner of goods may steal them from a bailee with a special property in them.

One retains the constructive possession of property although it is actually out of his control until some one else takes possession, except in the case of abandoned property. So where a desk was sold and coins were afterwards found by the purchaser in a secret drawer and taken by him, he takes it from the possession of the owner. Where a person finds property he has a right to take it and examine it. If the circumstances give him no clue to the ownership he can rightfully appropriate it, and this act or a subsequent refusal to give it up to the owner will not be a larceny. If the circumstances do give him such a clue he can rightfully assume possession for the owner and a subsequent change of intent and an appropriation of the property would not be a larceny, but where he intends to appropriate it at the time he assumes possession he is guilty of larceny, and none the less so if he intends to return it in the event that a reward is given.

In larceny, as in other crimes, the evil intent and the act must coexist; that is, as stated in the definition of larceny, the taking and removing must be with the particular intent described.

Where the original taking was wrongful, there a subsequent felonious intent makes the offense larceny in all cases in which there is concurrently with such intent, although subsequent to the taking, a fraudulent conversion or transmutation of the goods. Thus it has been held that where a man, driving away a flock of lambs, negligently took a lamb belonging to a third party, and then, upon subsequently finding out the fact of the true ownership, fraudulently converted the lamb to his own use, taking it from the rest of the flock, that this was larceny. (Reg. v. Riley, 14 Eng. L. & Eq. Rep. 566; 6 Cox, C. C. 88.)

The felonious intent in larceny is that entertained by a thief; i. e., a fraudulent intent to deprive the owner permanently of his property in the goods or of their value or a part of their value. Unless such a purpose exist with the taking and carrying away there is no larceny.

Thus larceny is not committed where the taking was without any intent at all as regards the property, as in the case of property taken by mistake or accidentally; or where the intent was to take one's own property, as in the case of property taken under a bona fide claim of right, however unfounded; or where the intent was to take another's property temporarily from his possession, as in the case of property taken for a temporary use, or in fun, or out of curiosity, or to keep for him, or to deprive him of the power of using it. Thus if one takes a horse merely to enable him to escape with stolen property, or takes property from a drunken friend in order to prevent him from losing it, or taking a cudgel out of the owner's hand to prevent a beating there is no larceny.

Whether the required intent exists where property is taken to pawn or hold for a reward depends upon the circumstances. Some cases of taking property to pledge would come within the above rule as to temporary use, as where the intent is in good faith to redeem and return it; but in the absence of such intent the taking is larceny.

Where the taking is with the design of returning it to the owner, but in the hope of obtaining a reward, it is not larceny; but if the purpose is to keep the property until a reward is offered it is. Taking property with the intent to sell it back to the owner or return it to him for some other consideration is, of course, more indicative of than inconsistent with the existence of the required intent. Thus, stealing a railroad ticket is none the less stealing because it was intended to be returned to the railroad when made use of.

Once the goods are taken and removed with the felonious intent above described the offense is complete and is none the less a larceny because the thief may have had in mind a disposition of the property without benefit or advantage to himself. Thus, an intent to give it to another or to destroy it out of revenge, or to prevent its use as evidence or otherwise against himself or another, does not prevent the felonious taking of another's property from being larceny.

In line with this principle it has been held that a servant who clandestinely took his master's oats for the purpose of feeding them to his master's horse was guilty of larceny.

When a larceny has been committed a prompt repentance by the thief, followed by a return of the property or payment for it, is no defense.

Personal property only can be stolen. Thus, where trees, fences, crops, or fixtures are cut down or severed by a trespasser and immediately taken away by him, there is no larceny. But should the trespasser, after cutting down some trees, for instance, leave the fallen timber and relinquish his possession, the possession of the owner attaches to the property in its new character as personal property, and a subsequent taking by the trespasser with intent to steal is larceny.

A piece of paper may be stolen, though its value is less than that of the smallest coin. A promissory note, a bank note, or a post-exchange check or other writing evidencing a chose in action is, under section 287, Federal Penal Code, supra, subject to theft and is to be deemed of the value of the amount of money due thereon, or secured to be paid thereby and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property the title to which is shown thereby, or the sum which might be recovered in the absence thereof.

PROOF.

(*a*) The taking by the accused of the property as alleged.

(*b*) The carrying away by the accused of such property.

(*c*) That such property belonged to a certain other person named or described.

(*d*) That such property was of the value alleged, or of some value.

(*e*) The facts and circumstances of the case indicating that the taking and carrying away were with a fraudulent intent to deprive the owner permanently of his property or interest in the goods or of their value or a part of their value.

VIII. EMBEZZLEMENT.

There is no section of the Federal Penal Code defining, for general purposes, the crime of embezzlement. Therefore, courts-martial will be governed by sections 834, 835, and 851b of the Code of the District of Columbia, which provide:

Sec. 834. Embezzlement by Agent, Attorney, Clerk, or Servant.—If any agent, attorney, clerk, or servant of a private person or copartnership, or any officer, attorney, agent, clerk, or servant of any association or incorporated company, shall wrongfully convert to his own use, or fraudulently take, make way with, or secrete, with intent to convert to his own use, anything of value which shall come into his possession or under his care by virtue of his employment or office, whether the thing so converted be the property of his master or employer or that of any other person, copartnership, association, or corporation, he shall be deemed guilty of embezzlement, and shall be punished by a fine not exceeding one thousand dollars or imprisonment for not more than ten years, or both.

Sec. 835. Embezzlement of Note Not Delivered.—Every embezzlement of any evidence of debt negotiable by delivery only, actually executed by the master or employer of any such clerk, attorney, agent, officer, or servant, but not delivered or issued as a valid instrument, shall be deemed an offense within the meaning of the last preceding section.

Sec. 851b. That if any person intrusted with the possession of anything of value, including things savoring of the realty, for the purpose of applying the same for the use and benefit of the owner or person so delivering it, shall fraudulently convert the same to his own use he shall, where the value of the thing so converted is $35 or more, be punished by imprisonment for not less than 1 nor more than 10 years, or by a fine of not more than $1,000, or both; and where the value of the thing so converted is less than $35 he shall be punished by imprisonment for not more than 1 year or by a fine of not more than $500, or both: Provided, That nothing contained in this section shall be construed to alter or repeal the foregoing sections contained in Subchapter II of Chapter XIX of this code.—Act approved March 3, 1913 (37 Stat. 727.)

Embezzlement differs from larceny in that the original taking of the property was lawful or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking. (Cyc., vol. 15, p. 488.)

Embezzlement is not a common law but a statutory offense.

The purpose of embezzlement statutes is to meet the case of a servant, clerk, bailee, or other person to whom the possession of property is intrusted by or for the owner, and who misappropriates it to his own use or otherwise, the circumstances being such that the act is not larceny.

The gist of the offense is a breach of trust, and can not be committed unless some fiduciary relationship exists between the owner and the person in possession of the property and

unless such possession was taken by virtue of such relationship.

PROOF.

(*a*) That the accused was the clerk or servant of a certain other person or stood in some other fiduciary relationship to that person, as alleged.

(*b*) That in such fiduciary capacity the accused received into his possession certain money or property of such person, as alleged.

(*c*) That he fraudulently converted or appropriated to his own use such money or property.

(*d*) The facts and circumstances showing that such conversion or appropriation was with fraudulent intent.

NOTE 1.—Section 905 of the Code of the District of Columbia provides:

"Sec. 905. The words 'anything of value,' wherever they occur in this chapter, shall be held to include not only things possessing intrinsic value, but bank notes and other forms of paper money, and commercial paper and other writings which represent value."

IX. PERJURY.

Section 125 of the Federal Penal Code of 1910 provides:

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years.

The words "competent tribunal, officer, or person" do not necessarily mean that the tribunal by which the oath is administered shall have been created by the Government which required it to be taken, nor that the officer who administers it shall be an officer of that Government. But the statute means that the oath must, at any rate, be permitted or required by some law of the United States, and be administered by some tribunal, officer, or person authorized by a law of the United States to administer oaths in respect of the particular matters to which it relates. (United States v. Curtis, 107 U. S., 671, 673.)

The usual and ordinary meaning of the word "deposition" is written testimony in legal proceedings. The words "declaration" and "certificate" are used in the statute in the ordinary and popular sense, and signify any statement of material matters of fact sworn to and signed by the party charged. (United States v. Ambrose, 108 U. S., 336, 340.)

To constitute perjury it is not sufficient that the oath taken be false and untrue as to some material matter, but it must further appear that the party knew at the time of taking the oath that the same was false and untrue, or else that he swore to his knowledge as of a fact, knowing that he had no such knowledge.

Perjury may be committed either by swearing to a fact which the witness knows is untrue or by swearing to his knowledge of the fact when he knows that he has no such knowledge. So also a witness may commit perjury in testifying falsely as to his belief, remembrance, or impression, or as to his judgment or opinion on matters of fact. Thus, where a witness swears that he does not remember certain facts, when in fact he does, he commits perjury, if the other elements of the offense are present. So, also, where a witness testified that in his opinion a certain person was drunk, when in fact he entertains the contrary opinion.

It is not necessary that the proceeding in which the oath is taken should be a judicial proceeding. (United States v. Hardison, 135 Fed. Rep., 419, 423.)

Thus perjury is committed where a false oath is taken as to a pension claim before a justice of the peace; where one intentionally swears falsely in making return of his income, although the statute imposing a tax upon income does not provide for compulsory disclosure under oath; where one testifies falsely to the credibility of a witness, such credibility being material; or where one testifies that he has never been in prison, the fact being otherwise; and where statements which the deponent does not believe to be true are made on a justification as bail. Perjury committed at an examination before a United States commissioner, under an act of Congress, is within this section. (Ex parte Bridges, Brown v. United States, 4 Fed. Cas., 99, 105.)

It is not perjury to testify by mistake to what is really believed to be true, however unfounded the belief may be; hence a witness may contradict under oath testimony formally given by him without committing perjury, since he may on such occasion have believed his testimony to be true.

Where a form of oath has been prescribed, a literal following of the statute is not essential. It is sufficient if the oath administered conforms in substance to the statutory form.

An oath includes affirmation, where the latter is authorized in lieu of an oath.

It is no defense that the witness voluntarily appeared, or that he was an incompetent witness, or that his testimony was given in response to questions that he could have declined to answer, even if he was forced to answer it over his claim of privilege.

It is a defense, however, if the tribunal or magistrate had no jurisdiction of the cause in which the false testimony was given.

The false testimony must be material to the issue or matter of inquiry, but the issue or matter of inquiry may be a collateral one. The issue may be proved by that part of the record of trial showing the pleadings, or by a duly authenticated copy thereof, or by a properly authenticated copy of the general court-martial order promulgating the proceedings of such trial, or in case of the loss or destruction of such evidence by secondary evidence thereof. It is for the court to determine whether or not the perjured testimony was in fact material to those issues properly established.

To constitute perjury an oath must be taken under or required by some law of the United States. A voluntary or extrajudicial oath, though false, is not perjury; neither is an oath taken under a departmental regulation for the enforcement of the oleomargarine law (no statute authorizing it); but where the departmental rules requiring the affidavit are in accord with the requirements of a statute a false affidavit constitutes perjury. (Van Gesner v. United States, 153 Fed. Rep., 46, 53.)

The authority of the officer who administers the oath upon which perjury is predicated is sufficiently alleged by stating that such officer was then and there a person having authority to administer such oath. A notary public is authorized to admin-

ister oaths in affidavits required by the Secretary of War under the act of March 3, 1863, and false swearing in reference to facts so required is perjury. (United States v. Sonachall, 27 Fed. Cas., 1259.)

The specification need not allege that the false oath was taken deliberately and corruptly, or otherwise than as indicated by the language of the statute. But the oath must be willfully taken. (United States v. Edwards, 43 Fed. Rep., 67; United States v. Lake, 129 Fed. Rep., 499, 502.) And the fact that the accused was sworn must be distinctly stated.

There can be no conviction for perjury unless the false oath or affidavit was taken, or made with a corrupt intent, and this is a question for the jury. (United States v. Smith, 27 Fed. Cas., 1175, 1183.)

It is not necessary that the false affidavit should have been used. (Noah v. United States, 128 Fed. Rep., 270, 272.) The unsupported testimony of a single witness is insufficient to convict. (United States v. Hall, 44 Fed. Rep., 864, 868.) But oral evidence is unnecessary if the jury believes documentary evidence. (United States v. Wood, 14 Pet., 430, 444.)

NOTE.—For false swearing, see paragraph 446 II, infra, "False swearing."

PROOF.

(a) That the accused took an oath in any of the cases provided in section 125, Federal Penal Code, 1910, as alleged in the specification.

(b) That such oath was administered by a person having authority to do so.

(c) That upon such oath accused testified, declared, deposed, or certified as alleged.

(d) That such testimony, declaration, deposition, or certificate was false and material to the inquiry as alleged.

(e) The facts and circumstances showing that such testimony, declaration, deposition, or certificate was taken or made willfully with a corrupt intent.

NOTE 2.—Falsely certifying to a claim or document under the War Risk Insurance Act (sec. 25, as amended by the act of Oct. 6, 1917 (40 Stat. 402)), is not perjury within the meaning of that term as used in the ninety-third article of war, but is chargeable under A. W. 96.

X. Forgery.

Forgery is not defined by the Federal Penal Code; but section 843 of the Code of the District of Columbia provides:

Whoever, with intent to defraud or injure another, falsely makes or alters any writing of a public or private nature, which might operate to the prejudice of another, or passes, utters, or publishes, or attempts to pass, utter, or publish as true and genuine, any paper so falsely made or altered, knowing the same to be false or forged, with the intent to defraud or prejudice the right of another, shall be imprisoned for not less than one year nor more than ten.

This statute will govern courts-martial, as to the definition of this offense.

Some of the instruments that are subjects of forgery are checks, indorsements, orders for the delivery of money or goods, railroad tickets, and receipts.

A writing **falsely made** includes a false instrument that is in part or entirely printed, engraved, written with a pencil, or made by photography or other device.

A writing may be made falsely by filling in a paper signed in blank, or by signing an instrument already written.

The writing must be false—must purport to be what it is not.

Thus, signing another's name to a check with intent to defraud is forgery, as the instrument purports on its face to be what it is not. But where, after the false signature of such person is added the word by, and the signature of the person making the check, thus indicating an authority to sign, the offense is not forgery even if no such authority exists, as the check on its face is what it purports to be.

Forgery may be committed by signing one's own name to an instrument. Thus, where a check payable to the order of a certain person comes into the hands of another of the same name, he commits forgery, when, knowing the check to be another's, he indorses it with his own name, intending to defraud.

Forgery may also be committed by signing a fictitious name, as where a person signs a check payable to himself with a fictitious name; but when he passes a check signed by him with a fictitious name, credit being extended to him without regard to his name, forgery is not committed.

To constitute a forgery the instrument must have apparent legal efficacy. The fraudulent making of an instrument affirmatively invalid on its face is not a forgery. But this requirement does not ordinarily prevent the fraudulent making of a signature on a check, for instance, from being a forgery even if there be no resemblance to the genuine signature and the name is misspelled.

The false writing must be made with intent to defraud or injure another. A person who signs another's name to an instrument believing that he has authority to do so does not commit a forgery.

It is immaterial, however, that anyone be actually defrauded or injured, or that no further step be made toward carrying out the intent to defraud than the making of the false writing.

Analysis and Proof.

Section 843 of the Code of the District of Columbia defines four crimes:

I. Falsely making a writing.

II. Falsely altering a writing.

III. Uttering a paper falsely made or falsely altered.

IV. Attempting to utter a paper falsely made or falsely altered.

PROOF.

I. Falsely Making a Writing.

(a) That a certain writing was falsely made, as alleged in the specification. (The instrument itself should be produced, if available.)

(b) That such writing was of a nature which might operate to the prejudice of another. (This will usually, but not always, appear from the face of the paper itself.)

(c) That it was the accused who so falsely made it.

(d) The facts and circumstances of the case, as alleged in the specification, indicating the intent of the accused thereby to either, as the case may be, (1) defraud or (2) injure another certain person.

II. Falsely Altering a Writing.

(a) That a certain writing was falsely altered, as alleged in the specification. (The instrument itself should be produced, if available.)

(b) That such writing was of a nature which might operate to the prejudice of another. (This will usually, but not always, appear from the face of the paper itself.)

(c) That it was the accused who so falsely altered it.

(d) The facts and circumstances of the case, as alleged in the specification indicating the intent of the accused thereby to, as the case may be, (1) defraud or (2) injure another certain person.

III. Uttering a Paper Falsely Made or Falsely Altered.

(a) That, as alleged in the specification, a certain paper was (1) falsely made or (2) falsely altered. (The instrument itself should be produced, if available.)

(b) That such writing was of a nature which might operate to the prejudice of another. (This will usually, but not always, appear from the face of the paper itself.)

(c) That the accused, as alleged in the specification, passed or uttered or published such paper as true and genuine.

(d) That the accused, when so doing, knew said paper to have been falsely made or falsely altered as alleged in the specification.

(e) The facts and circumstances of the case indicating the intent of the accused in so doing to either (1) defraud or (2) prejudice the right of a certain other person, as alleged in the specification.

IV. Attempting to Utter a Paper Falsely Made or Falsely Altered.

(a) That, as alleged in the specification, a certain paper was (1) falsely made or (2) falsely altered. (The instrument itself should be produced, if available.)

(b) That such writing was of a nature which might operate to the prejudice of another. (This will usually, but not always, appear from the face of the paper itself.)

(c) The facts and circumstances of the case showing that, as alleged in the specification, the accused attempted to pass or utter or publish such paper as true and genuine.

(d) That the accused, when so doing, knew said paper to have been falsely made or falsely altered, as alleged in the specification.

(e) The facts and circumstances of the case indicating the intent of the accused in so doing to either (1) defraud or (2) prejudice the right of a certain other person, as alleged in the specification.

XI. Sodomy.

Neither the Federal Penal Code nor the Code of the District of Columbia defines sodomy. Courts-martial are therefore governed by the common-law definition of this offense.

Sodomy at common law consists in sexual connection with any brute animal, or in sexual connection, per anum, by a man with any man or woman. (Wharton, vol. 1, p. 965.)

Penetration of the mouth of the person also constitutes this offense.

Both parties are liable as principals if each is adult and consents; but if either be a boy of tender age the adult alone is liable, and although the boy consent the act is still by force.

Penetration alone is sufficient.

An assault with intent to commit this offense consists of an assault on a human being with intent to penetrate his or her person per anum.

That which has been before stated, with regard to the evidence and manner of proof in cases of rape, ought especially to be observed upon a trial for this heinous offense. When strictly and impartially proved the offense well merits strict and impartial punishment; but it is from its nature so easily charged and the negative so difficult to be proved that the accusation ought clearly to be made out. The evidence should be plain and satisfactory in proportion as the crime is detestable.—4 Bl. Com., 215 (Archbold's Criminal Practice and Pleading, 8th ed., vol. 1, p. 1016.)

PROOF.

That the accused had sexual connection with a certain brute animal, or had sexual connection per anum, or by the mouth, with a certain man or woman, as the case may be, as alleged in the specification.

XII. Assault with intent to commit any felony.

An assault with intent to commit any felony is an assault made with a specific intent to murder, rape, rob, or to commit manslaughter, sodomy, or other common-law or statutory felony.

An assault is an attempt or offer with unlawful force or violence to do a corporal hurt to another. (Clark and Marshall, p. 271.)

Raising a stick over another's head as if to strike him, presenting a firearm ready for use within range of another, striking at another with a cane or fist, assuming a threatening attitude and hurrying toward another, are examples of assaults.

Some overt act is necessary in any assault. Mere preparation, such as unfastening the catch on a pistol holster in order that the pistol may be drawn, or picking up a stone at a considerable distance from another without making any attempt or offer to throw it, is not an assault.

The force or violence must be physical; mere words, however threatening, or insulting gestures are not by themselves sufficient to constitute an assault.

Furthermore, in an assault there must be an intent, actual or apparent, to inflict corporal hurt on another.

Where the circumstances known to the person menaced clearly negative such intent there is no assault. Thus, where a person accompanies an apparent attempt to strike another by an unequivocal announcement in some form of his intention not to strike, there is no assault. This principle was applied in a case where the defendant raised his whip and shook it at the prosecutor within striking distance saying, "If you weren't an old man, I would knock you down."

Viewed solely as an attempt to commit a battery there must be an actual or constructive intent to do a corporal hurt to another, and an act of unlawful violence or force begun to be executed with a view to inflicting such hurt. How such purpose is defeated is immaterial.

The following have been held to be assaults: Riding after a person so as to compel him to seek safety in an inclosure to avoid a beating, though the assailant was never near enough to hit him; rushing upon another in a threatening attitude although before quite close enough to strike, the person threatened strikes in self-defense or the attack is frustrated by a third person.

It is also an assault where the person in order to avert the taking effect of the unlawful violence yields to a demand of

his assailant. Thus, where A, being within striking distance of B, raises a weapon for the purpose of unlawfully striking him, stating that he will strike unless B does a certain thing, and B does that thing, thereby averting the blow, A commits an assault.

It is not a defense to a charge of assault that for some reason unknown to the assailant his attempt was bound to fail. Thus, where a soldier loads his rifle with what he believes to be a good cartridge and, pointing it at a person, pulls the trigger, he is guilty of assault although the cartridge was so defective that it could not be used. The same principle was applied to a case where a person in a house shoots through the roof at a place where he supposed a policeman was concealed, though the policeman was at another place on the roof.

The intent need not be to injure a particular person, and mere recklessness may supply the place of intent. Thus, where one strikes at A believing him to be B, he is guilty of assaulting A; and where one fires a loaded and capped pistol at another recklessly, and not knowing or seeking to know whether it is loaded or not, he commits an assault.

To constitute an assault, however, it is unnecessary that there be an actual or constructive intent to hurt anyone or a believed ability to inflict such hurt.

If there be, to the person set upon, an *apparent* present intent to injure, coupled with an *apparent* present ability to do so, it is sufficient.

The better opinion, however, is to the effect that if a person presents a gun at another, or threatens him with a stick or other weapon, and thereby reasonably puts him in fear and causes him to act on the defensive, or to retreat, there is an assault, whether there is any actual intention to injure or not. In a comparatively late Massachusetts case it was held that a man who pointed an unloaded gun at another was guilty of an assault, although he may have known that it was not loaded and may have had no intention to injure. "It is not the secret intent of the assaulting party," said the court, "nor the undisclosed fact of his ability or inability to commit a

battery, that is material, but what his conduct and the attending circumstances denote at the time to the party assaulted. If to him they indicate an attack, he is justified in resorting to defensive action. The same rule applies to the proof necessary to sustain a criminal complaint for an assault. It is the outward demonstration that constitutes the mischief which is punished as a breach of the peace." (Clark and Marshall, pp. 277, 278.)

If there be such a demonstration of violence, coupled with an apparent ability to inflict the injury, so as to cause the person at whom it is directed reasonably to fear the injury unless he retreat to secure his safety, and under such circumstances he is compelled to retreat to avoid any impending danger, the assault is complete, though the assailant may never have been within the actual striking distance of the person assailed. (Clark and Marshal, p. 281, note.)

There must, however, be an apparent present ability. To aim a pistol at a man at such a distance that it clearly could not injure would not be an assault.

A battery is an assault in which force is applied, by material agencies, to the person of another, either mediately or immediately. Thus, it is a battery to spit on another; to push a third person against him; to set a dog at him which bites him; to cut his dress while he is wearing it, though without touching or intending to touch his person; to shoot him; and to cause him to take poison. So it is a battery for a man to fondle against her will a woman not his wife. The force may be applied through conductors more or less close. Thus, to strike the dress of the person assailed, or the horse on which he is riding, or the house in which he resides, may be as much a battery as to strike his face; and sending an explosive machine by express from New York to San Francisco may be as much a battery as taking it to San Francisco in person. It is not, however, a battery to lay hands on another to attract his attention, or in a party falling to seize another for support. Sending a missile into a crowd also is a battery on anyone whom the missile hits; and so is the use, on the part of one who is excused in using force, of more force than is required.

1. Assault With Intent to Murder.

This is an assault aggravated by the concurrence of a specific intent to murder; in other words, it is an attempt to murder.

As in other attempts there must be an overt act, beyond mere preparation or threats, or an attempt to make an attempt.

Thus, it was held not an assault with intent to murder where the defendant drew a pistol from his hip pocket, but because of its becoming caught in the lining of his coat, did not make any actual attempt to inflict an injury with the pistol on the person alleged to have been assaulted.

To constitute an assault with intent to murder by firearms it is not necessary that the weapon be discharged; and in no case is the actual infliction of injury necessary. Thus, where a man with intent to murder another deliberately assaults him by shooting at him, the fact that he misses does not alter the character of the offense.

Where the intent to murder exists, the fact that for some reason unknown the actual consummation of the murder is impossible by the means employed does not prevent the person using them from being guilty of an assault with intent to commit murder where the means are apparently adapted to the end in view. Thus, where a soldier intending to murder another loads his rifle with what he believed to be a good cartridge and aims and discharges his rifle at the other, it is no defense that he, by accident, got hold of a cartridge so defectively loaded that the bullet did not leave the gun.

In order to constitute this offense the specific intent to murder must exist, and the facts must be such that had death been caused by the act the offense would have been murder, but the converse of this latter proposition is not always true, as a man may be guilty of murder without intending to kill. Thus, where a workman recklessly throws a heavy object from the roof of a building into a street where he knows people are likely to be passing and thereby kills a person, he may be guilty of murder; but where the person is merely injured, the offense of assault with intent to commit murder is not committed.

To constitute this offense there must be a specific intent to murder the person assaulted and this intent must exist at the time of the assault.

A general felonious intent of a specific design to commit another felony is not sufficient, and where a person is too drunk to entertain the specific intent the offense is not murder. But where the accused intending to murder A shoots at and wounds B, mistaking him for A, he is guilty of assaulting B with intent to murder him; so also where a man fires into a group with intent to murder some one he is guilty of an assault with intent to murder each member of the group.

2. Assault with Intent to Commit Manslaughter.

This offense differs from assault with intent to murder in the lack of the elements of malice necessary to constitute the latter crime.

It is an attempt to take human life in a sudden heat of passion.

The specific intent to kill is necessary and the act must be done under such circumstances that had death ensued the offense would have been manslaughter.

What has been said under the head of assault with intent to commit murder applies to the offense of assault with intent to commit manslaughter.

3. Assault with Intent to Commit Rape.

This is an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished. Indecent advances, importunities however earnest; mere threats; and actual attempts to rape wherein the overt act is not an assault do not amount to this offense. Thus, where a man, intending to rape a woman, stealthily concealed himself in her room to await a favorable opportunity to execute his design but was discovered and fled, it was held that he was not guilty of an assault with intent to commit rape.

No actual touching is necessary. Thus where a man entered a woman's room and got in the bed where she was and within

reach of her person for the purpose of raping her he commits the offense, although he did not touch the woman.

This offense may be committed on a woman who is insane or an imbecile, or while she is drugged or intoxicated, or asleep, provided the offense would be rape if the purpose was carried out. But an attempt to have connection with a woman capable of consenting and whose consent thereto has been obtained by fraud is not an assault with intent to commit rape.

Thus an attempt to have connection with a woman who has consented thereto in the belief that one personating her husband is her husband can not be an assault with intent to commit rape.

The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force, actual or constructive, and penetrate the woman's person. Any less intent will not suffice. Thus where a man assaults a woman, his purpose being to seduce her, the offense is not committed.

Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted or that the woman yields her consent to the connection, so that no rape is committed.

4. Assault With Intent to Rob.

This is an attempt to commit robbery wherein the overt act is an assault and the concurrent intent is forcibly to take and carry away property of the person assaulted from his person or in his presence by violence or putting him in fear.

The accused can not set up as a defense that he intended to take only money and that the person he attempted to rob had none.

5. Assault with Intent to Commit Sodomy.

For definition of sodomy, see Division XI of this paragraph, "sodomy," supra.

For definition of assault, see supra, this Division XII of this paragraph.

The assault must be against a human being, and must be with the specific intent to commit sodomy. Any less intent, or differ-

ent intent, will not suffice. (Compare, as to the requirements of the intent, which must be proved, the preceding subdivisions of this division of this paragraph.)

PROOF.

(1) Assault with intent to murder:

(*a*) That the accused assaulted a certain person, as alleged.

(*b*) The facts and circumstances of the case indicating the existence at the time of the assault of the specific intent of the accused to kill such person and that the killing would have been murder had death resulted.

NOTE.—Both the specific intent and the malice may be inferred from the deliberate use of a deadly weapon in a way calculated to cause death, or from other deliberate acts of violence likely to result in death or great bodily harm.

(2) Assault with intent to commit manslaughter:

(*a*) That the accused assaulted a certain person, as alleged.

(*b*) The facts and circumstances of the case indicating the existence at the time of the assault of the specific intent of the accused to kill such person and that the killing would have been voluntary manslaughter had death resulted.

(3) Assault with intent to commit rape:

(*a*) That the accused assaulted a certain female, as specified.

(*b*) The facts and circumstances of the case indicating the existence at the time of the assault of the intent of the accused to penetrate the person of such female at all events by overcoming any resistance on her part by actual or constructive force; and the facts and circumstances indicating that the offense of rape would have been committed had the accused succeeded in carrying out his purpose.

(4) Assault with intent to rob:

(*a*) That the accused assaulted a certain person, as alleged.

(*b*) The facts and circumstances of the case indicating the existence at the time of the assault of the intent on the part of the accused forcibly to steal property of such person from his person or in his presence by violence or putting him in fear.

(5) Assault with intent to commit sodomy:

(*a*) That the accused assaulted a certain person, as alleged.

(*b*) The facts and circumstances of the case indicating the concurrent intent to commit the offense on such person.

XIII. Assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing.

The offense denounced in this article as an assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing was, by Congress, meant to describe the offense of that nature, denounced in section 276, Federal Penal Code of 1910, as follows:

Whoever, with intent to do bodily harm, and without just cause or excuse, shall assault another with a dangerous weapon, instrument, or other thing shall be fined not more than one thousand dollars or imprisoned not more than five years, or both.

Weapons, etc., are dangerous when they are used in such a manner that they are likely to produce death or great bodily harm. Mere capability of being so used is not enough.

Boiling water may be so used as to be a dangerous thing, and a pistol may be so used as not to be a dangerous weapon.

PROOF.

(a) That the accused assaulted a certain person with a certain weapon, instrument, or thing.

(b) The facts and circumstances of the case indicating that such weapon, instrument, or thing was used in a manner likely to produce death or great bodily harm.

(c) The facts and circumstances of the case indicating that the assault was without just cause or excuse.

XIV. ASSAULT WITH INTENT TO DO BODILY HARM.

This is an assault aggravated by the specific present intent to do bodily harm to the person assaulted by means of the force employed.

It is not necessary that any battery actually ensue, or, if bodily harm is actually inflicted, that it be of the kind intended. Where the accused acts in reckless disregard for the safety of others it is not a defense that he did not have in mind the particular person injured.

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(*a*) That the accused assaulted a certain person, as alleged.

(*b*) The facts and circumstances of the case indicating the concurrent intent thereby to do bodily harm to such person.

444. *Ninety-fourth Article of War:*

[1] Any person subject to military law who makes or causes to be made any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

[2] Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

[3] Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

[4] Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures, or advises the making or use of, any writing or other paper, knowing the same to contain any false or fraudulent statements; or

[5] Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes or procures, or advises the making of, any oath to any fact or to any writing or other paper knowing such oath to be false; or

[6] Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures, or advises the forging or counterfeiting of any signature upon any writing or other paper, or uses, or procures, or advises the use of any such signature, knowing the same to be forged or counterfeited; or

[7] Who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

[8] Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the military service thereof, makes or delivers to any person such writing, without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States; or

[9] Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States furnished or intended for the military service thereof; or

[10] Who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, or other person who is a part of or employed in said forces or service,

any ordnance, arms, equipment, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same:

Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of said penalties. And if any person, being guilty of any of the offenses aforesaid while in the military service of the United States, receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed.

[11] And if any officer, being guilty, while in the military service of the United States, of embezzlement of ration savings, post exchange, company, or other like funds, or of embezzlement of money or other property intrusted to his charge by an enlisted man or men, receives his discharge, or is dismissed, or is dropped from the rolls, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not been so discharged, dismissed, or dropped from the rolls.

Definitions and Principles.

See the respective headings under which the offenses defined by this article are treated below.

Analysis and Proof.

The article applies to any person subject to military law, except that the last sentence is applicable solely to an officer who has been in the military service of the United States. See article 2.

The article embraces a large number of offenses which may be treated under headings, corresponding to the paragraphs of the article, as follows:

I. Making or causing to be made a false or fraudulent claim.

II. Presenting or causing to be presented for approval or payment a false or fraudulent claim.

III. Entering into an agreement or conspiracy to defraud the United States through false claims.

IV. Making, using, procuring, or advising the making or use of a false writing or other paper in connection with claims.

V. False oath in connection with claims.

VI. Forgery, etc., of signature in connection with claims.

VII. Delivering less than amount called for by receipt.

VIII. Making or delivering receipt without having knowledge that the same is true.

IX. Embezzlement, misappropriation, sale, etc., of military property.

X. Purchasing or receiving in pledge of military property.

XI. Former officer guilty, while he was in service, of embezzlement of ration savings, post exchange, company, or other like funds, or of money or other property entrusted to him by enlisted man.

I. MAKING OR CAUSING TO BE MADE A FALSE OR FRAUDULENT CLAIM.

Making a claim is a distinct act from presenting it. A claim may be made in one place and presented in another. This section does not relate to personal claims against an officer of the United States, but to claims against the United States made to such officer or otherwise. It is not necessary that the claim be allowed or paid nor that it be made by the person to be benefited by the allowance or payment. The claim must be made or caused to be made with knowledge of its fictitious or dishonest character. This does not include claims, however groundless they may be, that are honestly believed by the maker to be valid, nor claims that are merely made negligently or without ordinary prudence, but it does include claims made by a person who has the belief of the false character of the claim that the ordinarily prudent man would have entertained under the circumstances. (See also the discussion under "II" of this article.)

An instance of making a false claim would be where an officer having a claim respecting property lost in the military service knowingly includes articles that were not in fact lost and submits such claim to his commanding officer for the action of the board.

PROOF.

(*a*) That the accused made or caused to be made a certain claim against the United States, as alleged.

(*b*) That such claim was false or fraudulent in the particulars specified.

(*c*) That when the accused made the claim or caused it to be made he knew that it was false or fraudulent in such particulars.

(*d*) The amount involved, as alleged.

II. PRESENTING OR CAUSING TO BE PRESENTED FOR APPROVAL OR PAYMENT A FALSE OR FRAUDULENT CLAIM.

See second paragraph of the article and matter under heading "I."

The claim must be presented to some person having authority to approve or pay it. False and fraudulent claims include not only those containing some material false statement, but also claims that the person presenting knows to have been paid, or for some other reason knows he is not authorized to present or receive money on.

Where an officer knows that a certain duly assigned pay account of his is outstanding and that the assignee can collect on it if he chooses to do so, it is no defense to a charge against such officer of presenting for payment a second account covering the same period as the assigned account, that the second account was presented relying on the assignee's statement that he would not present the first. But where the accused has good grounds to believe and actually does believe when he presents the second account that the assigned account had been canceled or surrendered by the assignee, his presentation of the second claim does not constitute this offense. A cancellation or surrender of the first account after the presentation of the second account is, of course, no defense to the charge.

Presenting to a paymaster a false final statement, knowing it to be false, is an example of an offense under this paragraph.

PROOF.

(*a*) That the accused presented or caused to be presented for approval or payment to a certain person in the civil or military service of the United States a certain claim against the United States, as alleged.

(*b*) That such claim was false or fraudulent in the particulars alleged.

(*c*) That when the accused presented the claim or caused it to be presented he knew it was fictitious or dishonest in such particulars.

(*d*) The amount involved, as alleged.

III. ENTERING INTO AN AGREEMENT OR CONSPIRACY TO DEFRAUD THE UNITED STATES THROUGH FALSE CLAIMS.

See the third paragraph of this article.

A conspiracy is the corrupt agreeing together of two or more persons to do by concerted action something unlawful either as a means or an end. (Bishop, vol. 2, p. 98.)

The mere entry into a corrupt agreement for the purpose of defrauding the United States through any of the means specified constitutes the offense. An example of this offense is an agreement between a contractor and an officer to defraud the United States by means of a padded voucher to be certified as correct by the officer.

PROOF.

(*a*) That the accused and one or more other persons named or described entered into an agreement.

(*b*) That the object of the agreement was to defraud the United States.

(*c*) That the means by which the fraud was to be effected were to obtain or assist certain other persons to obtain the allowance or payment of a certain false or fraudulent claim, as specified.

(*d*) The amount involved, as alleged.

IV. MAKING, USING, PROCURING, OR ADVISING THE MAKING OR USE OF A FALSE WRITING OR OTHER PAPER IN CONNECTION WITH CLAIMS.

See the fourth paragraph of the article, and matter under headings "I" and "II."

It is not necessary to the offense of making a writing knowing it to contain false or fraudulent statements that such writing be used or attempted to be used, or that the claim in support of which it was made be presented for approval, allowance, or payment. The false or fraudulent statement should, however, be material.

In the offense of procuring the making or use of the writing or other paper, the paper must be made or used; but in the offense of advising such acts the making or use of the paper is not necessary. Examples of offenses under this paragraph are: Willfully inducing another to make to the United States a lease of premises containing a false and fraudulent statement with a view of obtaining the allowance of a false claim for rent against the United States; falsification by a soldier of an entry in the company clothing book for the purpose described in this paragraph of the article; and the making by an officer in his pay account of false and fraudulent statements with a view to securing the payment of such account.

PROOF.

(*a*) That the accused made or used or procured or advised the making or use of a certain writing or other paper, as alleged.

(*b*) That certain statements in such writing or other papers were false or fraudulent, as alleged.

(*c*) That the accused knew this.

(*d*) The facts and circumstances indicating that the act of the accused was for the purpose of obtaining or aiding certain others to obtain the approval, allowance, or payment of a certain claim or claims against the United States, as specified.

(*e*) The amount involved, as alleged.

V. FALSE OATH IN CONNECTION WITH CLAIMS.

See the fifth paragraph of the article and matter under headings "I," "II," and "IV."

PROOF.

(*a*) That the accused made or procured or advised the making of an oath to a certain fact or to a certain writing or other paper, as alleged.

(*b*) That such oath was false, as alleged.

(*c*) That the accused knew it was false.

(*d*) The facts and circumstances of the case indicating that the act was for the purpose of obtaining or aiding certain others to obtain the approval, allowance, or payment of a certain claim or claims against the United States, as alleged.

VI. FORGERY, ETC., OF SIGNATURE IN CONNECTION WITH CLAIMS.

See the sixth paragraph of the article and matter under headings "I" and "II" above.

The term "forges or counterfeits" includes any fraudulent making of another's signature, whether an attempt is made to imitate the handwriting or not.

PROOF.

(*a*) That the accused forged or counterfeited the signature of a certain person on a certain writing or other paper or that he procured or advised the act as specified; or that he used the forged or counterfeited signature of a certain person or procured or advised its use, knowing such signature to be forged or counterfeited, as alleged.

(*b*) The facts and circumstances of the case indicating that his act was for the purpose of obtaining or aiding certain others to obtain the approval, allowance, or payment of a certain claim or claims against the United States, as alleged.

VII. DELIVERING LESS THAN AMOUNT CALLED FOR BY RECEIPT.

See the seventh paragraph of the article.

It is immaterial in this offense by what means, whether by deceit, collusion, or otherwise, the accused effected the transaction, or what his purpose was in so doing.

Instances of this offense are:

A contractor gave a receipt for a greater amount than was due him from the United States. Thereupon the disbursing officer gave him the full amount called for by the receipt, but received back from the contractor the excess over the amount actually due.

A disbursing officer, having delivered to a creditor of the United States less money than was actually due, received a receipt signed in blank by the creditor, which he afterwards completed by writing the true amount due.

PROOF.

(*a*) That the accused had charge, possession, custody, or control of certain money or property of the United States furnished or intended for the military service thereof, as alleged.

(*b*) That he obtained a receipt for a certain amount or quantity of such money or property, as alleged.

(*c*) That for such receipt he knowingly delivered, or caused to be delivered, to a certain person having authority to receive it an amount or quantity of such money or property less than the amount or quantity thereof specified in such receipt.

(*d*) The value of the undelivered money or property, as alleged.

VIII. MAKING OR DELIVERING RECEIPT WITHOUT HAVING FULL KNOWLEDGE THAT THE SAME IS TRUE.

See the eighth paragraph of the article.

Where, for instance, an officer, or other person subject to military law, is authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the military service thereof, and a receipt or other paper is presented to him for signature, stating that a certain amount of supplies has been furnished by a certain contractor, it becomes his imperative duty before signing the paper to have full knowledge that the full amount of supplies therein stated to have been furnished has in effect been furnished, and that the statements contained in the paper are true. If he signs the

paper without such full knowledge, then he is guilty of a violation of this clause of the article, whether or not he knows or has reason to know that the statements in the paper are untrue, since it is his duty to know that they are true before signing it. If in fact he knows that a less amount of supplies has actually been furnished than the amount stated in the receipt, then of course such definite knowledge of the falsity of the paper makes it impossible for him to have full knowledge that the amount stated in the receipt to have been furnished is true, and therefore makes him guilty of a violation of this clause of the article; but he is equally guilty under this clause if in fact he does not know whether or not the statement in the paper is true and signs it without first taking the necessary steps to procure full knowledge on the subject and without actually having full knowledge that it is true. If he fails in that duty, and signs the paper without taking the proper steps to procure knowledge of the facts, his action in so signing without full knowledge of the facts will be deemed prima facie evidence of an intent to defraud the United States, and the burden of proof is on him to show, if he can, that he did not in fact have such intent, if it turns out afterwards that the paper was in fact false.

PROOF.

(*a*) That the accused was authorized to make or deliver a certificate of the receipt from a certain person of certain property of the United States furnished or intended for the military service thereof, as alleged.

(*b*) That he made or delivered to such person such certificate, as alleged.

(*c*) That such certificate was made or delivered without the accused having full knowledge of the truth of a certain material statement or statements therein.

(*d*) The facts and circumstances indicating that his act was done with intent to defraud the United States.

(*e*) The amount involved, as alleged.

IX. EMBEZZLEMENT, MISAPPROPRIATION, SALE, ETC., OF MILITARY PROPERTY.

For definitions and principles respecting larceny and embezzlement, see headings "VII" and "VIII" under the ninety-third article.

Misappropriating is devoting to any unauthorized purpose. The misapplication meant is where such purpose is for the party's own use or benefit.

For the definition of "disposes of," see heading "I" under the eightieth article.

The larceny, embezzlement, etc., must be of the particular kind of property mentioned in the article. Post exchange and company funds and money appropriated for other than the military service do not come within the description "money of the United States furnished or intended for the military service thereof." The term "embezzlement" as used in this article does not include acts or omissions not within the definition of embezzlement under sections 834 and 835, or 851b, of the Code of the District of Columbia (see "Embezzlement, Division VIII, par. 443, supra), but which may be expressly declared by some other special statute to be embezzlements. Such other statutory embezzlements are chargeable, however, under the ninety-sixth article.

The misappropriation of the property or money need not be for the benefit of the accused; the words "to his own use or benefit" qualify the word "applies" only.

Instances of misappropriation are:

An officer of the Quartermaster's Department used teams, tools, and other public property in his possession as such officer in erecting buildings, etc., for the beneft of an association composed mainly of civilians, of which he was a member.

An officer of the Quartermaster's Department loaned public property (corn) to a contractor for the purpose of enabling him to fill a contract made with the United States through another officer.

An instance of misapplication is the temporary use by a quartermaster of Government horses in his charge to draw his private carriage on nonpublic business.

PROOF.

In larceny and embezzlement:

(*a*) See proof under headings "VII" and "VIII" under the ninety-third article.

(*b*) That the property belonged to the United States and that it was furnished or intended for the military service thereof.

In misappropriation and misapplication:

(*a*) That the accused misappropriated or applied to his own use certain property in the manner alleged.

(*b*) That such property belonged to the United States and that it was furnished or intended for the military service thereof.

(*c*) The facts and circumstances of the case indicating that the act of the accused was willfully and knowingly done.

(*d*) The value of the property, as specified.

X. PURCHASING OR RECEIVING IN PLEDGE OF MILITARY PROPERTY.

See the tenth paragraph of the article and matter under fifty-ninth article.

To constitute this offense the accused must know not only (1) that the person selling or pawning the property was in one of the specified classes and (2) that the property was the property of the United States, but also (3) that the person so selling or pawning it had no lawful right so to do.

As to "knowingly" see "Definitions and principles" under fifty-fifth article.

PROOF.

(*a*) That the accused purchased, or received in pledge, for a certain obligation or indebtedness certain military property of the United States, as alleged, knowing it to be such property.

(*b*) That such property was purchased or so received in pledge from a certain soldier, officer, or other person who was a part of or employed in the military service of the United States, as alleged, and that the accused knew the person selling or pledging the property to be such soldier, officer, or other person.

(*c*) That such soldier, officer, or other person had not the lawful right to sell or pledge such property.

(d) That the accused knew, at the time of such lack of lawful right in such soldier, officer, or other person, to so sell or pledge such property.

(e) The value of the property, as alleged.

XI. Former officer guilty, while he was in service, of embezzlement of ration savings, post exchange, company, or other like funds, or of money or other property entrusted to him by enlisted men.

See the last sentence of the article and see also "Embezzlement," Division VIII, paragraph 443, supra, and also Division IX of this paragraph, supra. No one can be tried under this paragraph of the article except a person who was formerly an officer of the Army and who has been discharged, dismissed, or dropped from the rolls, and for one of the offenses mentioned in this paragraph, committed while the accused was in the military service of the United States, and within the limitation of time fixed by the thirty-ninth article of war, that is to say, committed within three years before arraignment.

PROOF.

(a) That the accused was formerly an officer of the Army of the United States.

(b) That the accused has received his discharge from the Army or has been dismissed or dropped from the rolls.

(c) That the accused, while in the military service of the United States, was guilty, as alleged in the specification, of embezzlement of (1) ration savings, (2) post exchange funds, (3) company funds, (4) other like funds, or (5) of money or other property entrusted to his charge by an enlisted man or men. (For proof of embezzlement see under "Embezzlement," supra, Division VIII, par. 443.)

445. *Ninety-fifth Article of War:*

Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.

DEFINITIONS AND PRINCIPLES.

The conduct contemplated is action or behavior in an official capacity which, in dishonoring or disgracing the individual as an officer, seriously compromises his character and standing as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as

morally unworthy to remain a member of the honorable profession of arms. (Winthrop, p. 1106.)

There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty or unfair dealing; of indecency or indecorum; or lawlessness, injustice, or cruelty.

Not every one is or can be expected to meet ideal standards or to possess the attributes in the exact degree demanded by the standards of his own time; but there is a limit of tolerance below which the individual standards in these respects of an officer or cadet can not fall without his being morally unfit to be an officer or cadet or to be considered a gentleman.

This article contemplates such conduct by an officer or cadet which, taking all the circumstances into consideration, satisfactorily shows such moral unfitness.

This article includes acts made punishable by any other article of war, provided such acts amount to conduct unbecoming an officer and a gentleman; thus, an officer who embezzles military property violates both this and the preceding article.

Instances of violation of this article are:

Knowingly making a false official statement; dishonorable neglect to pay debts; opening and reading another's letters; giving a check on a bank where there were no funds to meet it, and without intending that there should be; using insulting or defamatory language to another officer in his presence, or about him to other military persons; being grossly drunk and conspicuously disorderly in a public place; public association with notorious prostitutes; cruel treatment of soldiers; committing or attempting to commit a crime involving moral turpitude; failing without a good cause to support his family.

For other instances, see Digest, pages 140–143, and Winthrop, pages 1107–1115.

Analysis and Proof.

This article applies to officers and cadets only.

The article defines one offense, viz:

I. CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN.

PROOF.

(*a*) That the accused did or omitted to do the acts as alleged.

(*b*) The circumstances, intent, motive, etc., as specified.

446. *Ninety-sixth Article of War.*

Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

DEFINITIONS AND PRINCIPLES.

See matter under the respective headings under which the offenses are treated.

ANALYSIS AND PROOF.

The article applies to any person subject to military law. See article 2. The article embraces offenses falling within the classes described therein, and not mentioned in the other punitive articles. The offenses may be treated under the following headings:

I. Disorders and neglects to the prejudice of good order and military discipline.

II. Conduct of a nature to bring discredit upon the military service.

III. Crimes or offenses not capital.

I. DISORDERS AND NEGLECTS TO THE PREJUDICE OF GOOD ORDER AND MILITARY DISCIPLINE.

The disorders and neglects include all acts or omissions to the prejudice of good order and military discipline not made punishable by any of the preceding articles.

By the term "to the prejudice," etc., is to be understood *directly* prejudicial, not *indirectly* or *remotely* merely. An irregular or improper act on the part of an officer or soldier

can scarcely be conceived which may not be regarded as in some indirect or remote sense prejudicing military discipline; but it is hardly to be supposed that the article contemplated such distant effects, and the same is, therefore, deemed properly to be confined to cases in which the prejudice is *reasonably direct and palpable.* (Winthrop, p. 1123.)

Instances of such disorders and neglects in the case of officers are: Disobedience of standing orders, or of the orders of an officer when the offense is not chargeable under a specific article; allowing a soldier to go on duty knowing him to be drunk; rendering himself unfit for duty by excessive use of intoxicants or drugs; drunkenness.

Instances of such disorders and neglects in the cases of enlisted men are: Failing to appear on duty with a proper uniform; appearing with dirty clothing; malingering; abusing public animals; refusing to submit to treatment necessary to render him fit for duty; refusing to submit to a necessary and proper operation not endangering life (see par. 53, C. of O., 1881–1915); careless discharge of firearms; personating an officer; making false statements to an officer in regard to matters of duty.

PROOF.

(*a*) That the accused did or failed to do the acts alleged.
(*b*) The circumstances, intent, etc., as specified.

II. CONDUCT OF A NATURE TO BRING DISCREDIT UPON THE MILITAY SERVICE.

Instances of such conduct on the part of persons subject to military law are unlawful violations of local State statutes (not enacted by authority of any law of the United States), or municipal ordinances or regulations, or of the laws of friendly foreign countries; or where they are guilty of any other discreditable conduct not made punishable by any specific articles, or by the other parts of the ninety-sixth (the general) article.

"Discredit," as here used, means to injure the reputation of.

Another principal object of including this phrase in the general article was to make military offenses those acts or omissions of retired soldiers which were not elsewhere made

punishable by the Articles of War but which are of a nature to bring discredit on the service, such as a failure to pay debts.

False Swearing.—Giving false testimony before State courts and other tribunals not organized or acting under any law of the United States, and making false oaths or affidavits in any other case in which no law of the United States authorizes an oath to be administered, is not perjury under section 125 of the Federal Penal Code of 1910 (see "Perjury," Division IX, par. 443, supra), and is, therefore, not punishable as perjury under the ninety-third article of war. Such false swearing is chargeable as conduct of a nature to bring discredit upon the military service under the ninety-sixth article of war.

PROOF.

(*a*) That the accused did or failed to do the acts alleged.
(*b*) The circumstances, intent, etc., as specified.

III. CRIMES OR OFFENSES NOT CAPITAL.

The crimes referred to in A. W. 96 manifestly embrace those not capital committed in violation of public law as enforced by the civil power (U. S. *v.* Grafton, 206 U. S. 348), the "public law" here in contemplation being that of the United States; that is, that enacted or adopted by the authority of the Government of the United States. This includes the laws of the District of Columbia and of the several Territories and possessions of the United States as well as all laws of the United States; but it excludes city ordinances and regulations and State statutes, as well as the laws of friendly foreign countries (violations of which are, however, chargeable as conduct of a nature to bring discredit upon the military service. (See, supra, Division II of this paragraph.)

All crimes or offenses in violation of such public law of the United States, wherever committed, that are not thereby made punishable by death, are excluded, except such as are specifically included in some other article.

Within this description would be a noncapital crime which, although designated by some special enactment for some special purpose, or if committed by some special person or

class of persons, or under some special circumstance, with one of the names used, for instance, in the ninety-third article, is not within the general definition of the offense.

Thus section 90 of the Federal Penal Code of 1910 provides that a failure by an officer to render accounts for public money received by him unless authorized to retain it as salary, pay, or emolument is an embezzlement of such funds. Such an embezzlement not being within the general definition of embezzlement as the term is used in the ninety-third and ninety-fourth articles would be chargeable under the general article.

The elements of some of the more common crimes that are chargeable under this article will now be discussed.

(1) *Assault.*

(2) *Assault and battery.*—See matter under heading "XII" under ninety-third article.

A battery is any unlawful touching or injury, however slight, to the person of another directly or indirectly done in an angry, revengeful, rude, or insolent manner. Throwing water or spitting in a person's face is a battery. So, merely taking hold of another's clothing, or pushing another against him, or striking a horse on which he is riding causing him to be thrown; striking his cane while in his hand, is a battery when done unlawfully and in the manner described.

If the injury is accidentally inflicted in doing a lawful act without culpable negligence the offense is not committed; but where personal injury results from the reckless doing of an act likely to result in such injury, the offense is committed.

It is no defense that the injury took place on a person for which it was not intended, or that the injury was not the immediate result of the defendant's acts. Thus, if a person throws a firecracker in a crowd where it is tossed from hand to hand and finally explodes and puts out a man's eye, the offense is committed.

(3) Maiming.—Section 283 of the Federal Penal Code of 1910 provides:

Whoever, with intent to maim or disfigure, shall cut, bite, or slit the nose, ear, or lip, or cut out or disable the tongue, or put out or destroy an eye, or cut off or disable a limb or any member of another

person; or whoever, with like intent, shall throw or pour upon another person any scalding hot water, vitriol or other corrosive acid, or caustic substance whatever, shall be fined not more than one thousand dollars or imprisoned not more than seven years, or both.

This is more inclusive than the common-law mayhem punishable under A. W. 93 (see "Mayhem," Division II, par. 443, supra) in that mayhem only includes such hurts as render a man "less able, in fighting, either to defend himself or to annoy his adversary," and does not include such injuries as merely disfigure. Injuries of the latter class, therefore, together with such injuries as scalding with hot water, vitriol or other corrosive acid, or a caustic substance, which constitute violations of section 283 of the Federal Penal Code above quoted, should be charged as maiming, under A. W. 96. (See also "Assault with a dangerous weapon, instrument, or other thing," Division XIII, par. 443, supra.)

(4) Carnal Knowledge of Female under Sixteen.—Section 279 of the Federal Penal Code of 1910 provides:

Whoever shall carnally and unlawfully know any female under the age of sixteen years, or shall be accessory to such carnal and unlawful knowledge before the fact, shall, for a first offense, be imprisoned for not more than fifteen years, and for a subsequent offense be imprisoned not more than thirty years.

This offense is not rape and, therefore, it is not punishable with death, and can not be charged under the ninety-second article of war. (As to rape, see Division II, par. 442, supra.)

Neither force nor absence of consent of the female is essential to be proved in a prosecution under this section, but evidence of absence of consent is admissible as affecting the measure of punishment.

The essential elements of the offense are (1) the carnal knowledge and (2) that the female was under 16 years of age, and was not the lawful wife of the accused. (As to carnal knowledge, see, supra, "Rape," Division II, par. 442.)

(5) Burning Buildings, Vessels, Lumber, Stores, Arms, Ammunition, etc.—Section 286 of the Federal Penal Code of 1910 provides:

Sec. 286. Whoever shall maliciously set fire to, burn, or attempt to burn, or by any means destroy or injure, or attempt to destroy or injure, any arsenal, armory, magazine, ropewalk, shiphouse, warehouse,

blockhouse, or barrack, or any storehouse, barn, or stable not parcel of a dwelling house, or any other building not mentioned in the section last preceding, or any vessel built, building, or undergoing repair, or any lighthouse, or beacon, or any machinery, timber, cables, rigring, or other materials or appliances for building, repairing, or fitting out vessels, or any pile of wood, boards, or other lumber, or any military, naval, or victualing stores, arms, or other munitions of war, shall be fined not more than five thousand dollars and imprisoned not more than twenty years.

This section covers the burning and destruction of buildings which are not the subject of arson. (U. S. v. Cardish, 143 Fed. Rep., 640.) (As to arson, see Division III, par. 443, supra.)

This section of the Penal Code is broad enough to cover any burning or destruction or injury, or attempt to burn, destroy, or injure any structure, machinery, appliances, equipment or stores, or arms or ammunition of any kind whatever.

PROOF.

Crimes in general:

(*a*) That the accused did, or failed to do, the acts alleged.

(*b*) The circumstances, intent, etc., as alleged.

CHAPTER XVIII.

COURTS OF INQUIRY.

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SECTION I.

CONSTITUTION.

447. WHEN AND BY WHOM ORDERED.—A court of inquiry to examine into the nature of any transaction of or accusation or imputation against any officer or soldier may be ordered by the President or by any commanding officer, but a court of inquiry shall not be ordered by any commanding officer except upon the request of the officer or soldier whose conduct is to be inquired into. (A. W. 97.)

447a. Retention of Officers in the Service.—A court of inquiry may also be ordered to inquire into the propriety of the action of a classification board in classifying an officer in class B, "officers who should not be retained in the service." (Sec. 24b, act of June 4, 1920, 41 Stat. 773.)

448. LIMITATION UPON POWER TO CONVENE.—There is no statutory restriction to the meaning of the term "commanding officer," consequently any commander of the officer or soldier who makes the request would have authority to convene the court, but if the charge to be inquired into is beyond the jurisdiction of a court-martial which such commander can appoint, he would not, by analogies of the service in the administration of military justice, be the proper convening authority in such case. (Op. J. A. G., approved by Secretary of War, Sept. 19, 1874.)

449. DISCRETION AS TO ORDERING COURT.—Neither the President nor a commanding officer is obliged to order a court of inquiry on demand of an officer or soldier. Where the facts are thoroughly understood by the authority who is requested to order a court of inquiry or can be satisfactorily ascertained by an investigating officer, the commanding officer may, in his discretion, refuse the application; but in the event of such refusal the party, if not satisfied, may appeal to higher authority. (Winthrop, p. 803.)

SECTION II.

JURISDICTION.

450. AS TO PERSONS.—A court of inquiry may examine into the conduct of officers or soldiers only (A. W. 97), and the inquiry is confined to those actually in the service. (Digest, p. 586, XVIII, B.)

451. As to Time.—The statute of limitations (A. W. 39) does not apply to courts of inquiry. There is no legal objection therefore to investigating transactions that are remote in time.

452. As to Subject Matter.—The inquiry is limited to transactions of or accusations or imputations against officers or soldiers. (A. W. 97.) The principal uses which courts of inquiry are expected to serve are: (*a*) For determining whether there should be a trial by court-martial in a particular instance; (*b*) for informing and advising superior authority in cases which appear not to call for trial by court-martial, but for some other military or administrative action; (*c*) for the vindication of character or conduct (Winthrop, p. 805); and (d) for inquiring into the correctness of the action of classification boards in classifying officers in class B as not to be retained in the service, under the provisions of section 24b of the Army Reorganization Act of June 4, 1920 (41 Stat., 773).

Section III.

COMPOSITION.

453. Members.—A court of inquiry shall consist of three or more officers. (A. W. 98.) The Secretary of War may assign retired officers, with their consent, upon courts of inquiry. (Act of Apr. 23, 1904.) In time of war retired officers may be employed on active duty in the discretion of the President. (Sec. 127a, subpar. 3, act of June 4, 1920; 41 Stat., 773.)

454. Recorder.—For each court of inquiry the authority appointing the court shall appoint a recorder. (A. W. 98.) The recorder is not an adviser of the court nor a prosecutor before it, but will assist the court, if it so desires, in all matters leading to correct conclusions of fact and law.

455. Convening Order.—The form of the convening order is similar to that for a court-martial. It details the members and recorder by name, fixes the time and place of meeting, specifies the subject matter of inquiry, and directs a report of the facts only, or of the facts with an opinion on the merits of the case.

456. Rank of Members.—There is no statute prescribing the rank of members, but when it can be avoided they should not be inferior in rank to the officer whose conduct is being inquired into. The decision of the appointing authority, as indicated by the order convening the court, is conclusive as to whether or not it can be avoided.

457. Reporter and Interpreter.—The president of a court of inquiry has the same power to appoint reporters and interpreters as is delegated to the president of a court-martial. (A. W. 115.) They will be paid at the rates fixed by paragraph 113, supra. An enlisted man may be detailed to serve as stenographic reporter and will receive extra pay as provided by paragraph 115, supra. (Act of Aug. 24, 1912, 37 Stat., 575.)

A reporter will always be appointed for a court of inquiry convened to consider the classification of an officer in class B, under section 24b of the Army Reorganization Act of June 4, 1920, 41 Stat., 773.

Section IV.

POWERS.

458. To Summon and Examine Witnesses.—A court of inquiry and the recorder thereof shall have the same power to summon and examine witnesses as is given to a court-martial and the trial judge advocate thereof. (A. W. 101.)

459. Refusal to Appear or Testify.—Any person not subject to military law who, being duly subpœnaed to appear as a witness before a court of inquiry or before any officer, military or civil, designated to take a deposition to be read in evidence before such court, willfully neglects or refuses to appear, or refuses to qualify as a witness, or to testify, or to produce documentary evidence which such person may have been legally subpœnaed to produce, shall be deemed guilty of a misdemeanor and punished as in like offenses with respect to courts-martial. (A. W. 23.)

[*Note.—Paragraph 460 is omitted in this revision.*]

Section V.

PROCEDURE.

461. General Principles.—A court of inquiry is governed by the general principles of military law, applying the

analogies of a court-martial where they are applicable, and recurring to adjudged cases, precedents, rules, authoritative legal opinions, and approved books of legal exposition where there is no pertinent paramount stated rule. A court of inquiry is not really a court in the legal sense of the term, for no criminal issue is formed before it, it arraigns no accused, receives no plea, makes no findings of guilt or innocence, awards no punishment, and expresses no opinion unless specially ordered to do so.

462. Presence of Party Whose Conduct Is Being Investigated.—The presence of the party whose conduct is being investigated is not essential and his absence does not affect the authority of the court to proceed with the hearing; but nevertheless he will ordinarily, in all cases (and always in cases of courts of inquiry convened to consider the classification of an officer in class B, under section 24b of the Army Reorganization Act of June 4, 1920, 41 Stat., 773) be given an opportunity to be present.

463. Counsel.—The party whose conduct is being inquired into shall have the right to be represented before the court by counsel of his own selection, if such counsel be reasonably available. (A. W. 99.) So also the accuser, where there is one, should usually be allowed to be present with counsel, and a similar privilege may properly be extended to any officer who will be materially involved in the inquiry. (Winthrop, p. 812.)

464. Challenge.—Members of a court of inquiry may be challenged by the party whose conduct is being inquired into, but only for cause stated to the court. The court shall determine the relevancy and validity of any challenge, and shall not receive a challenge to more than one member at a time. (A. W. 99.)

465. Reduced Numbers.—Where the number of members is reduced by casualty or challenge, the court may proceed with the reduced number, if not below the minimum, but the appointing authority should be notified in order that he may detail new members if he desires to do so. If any testimony has been taken before a new member is added, it should be

read to him in the presence of the other members. In the absence of the recorder the junior member can not act as recorder. The proper procedure is to notify the convening authority and adjourn to await the appointment of another recorder.

466. Oaths.—The recorder of a court of inquiry shall administer to the members the following oath:

You, A. B., do swear (or affirm) that you will well and truly examine and inquire, according to the evidence, into the matter now before you, without partiality, favor, affection, prejudice, or hope of reward. So help you God.

After which the president of the court shall administer to the recorder the following oath:

You, A. B., do swear (or affirm) that you will, according to your best abilities, accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing. So help you God.

In case of affirmation the closing sentence of adjuration will be omitted. (A. W. 100.)

Witnesses shall take the same oath or affirmation that is taken by witnesses before courts-martial, and a reporter or interpreter shall, before entering upon his duties, take the oath or affirmation required of a reporter or an interpreter for a court-martial. (A. W. 101.)

467. Examination of Witnesses.—The examination of witnesses may be by the court, by a member thereof, or by the recorder, in the discretion of the court. The party whose conduct is being inquired into or his counsel, if any, shall be permitted to examine and cross-examine witnesses so as fully to investigate the circumstances in question. (A. W. 101.) A witness may not be compelled to answer any question the answer to which may tend to incriminate him, or any question not material to the issue when such answer might tend to degrade him. (A. W. 24.)

468. Depositions.—Depositions to be read in evidence before courts of inquiry are taken and admitted in evidence under the same rules governing their taking and admissibility in evidence before courts-martial. (A. W. 25, 26.)

469. Conclusions.—The court must, as a finding, give its conclusions as to the facts, and, when ordered, must also give an opinion on the merits of the case. The conclusions or opinion may not be unanimous, in which case a dissenting conclusion or opinion is authorized.

470. Obligation of secrecy.—The oath of members of a court of inquiry, unlike that of members of a court-martial, does not enjoin upon them secrecy as to the votes and opinions of members, but under the custom of the service it would be conduct prejudicial to discipline to divulge the recommendation or opinion of the court until announced by the appointing authority, or to disclose the vote or opinion of a member unless legally required to do so.

471. Revision by Court.—If not satisfied with the investigation, or with the report or opinion, the reviewing authority may reassemble the court, in the same manner as a court-martial, and return the proceedings with direction either to have the investigation pursued further and completed, or the report of the facts made more detailed and comprehensive, or the opinion expressed in terms more definite and unequivocal or more responsive to the original instructions, or to correct or supply some other error or defect. The inquiry not being a trial but an investigation merely, the court may properly be required, upon revision, to reexamine witnesses or to take entirely new testimony, or it may do so of its own motion without orders in connection with the revision. (Winthrop, p. 819.)

472. Publication of Proceedings.—The reviewing authority, having taken final action upon the report or opinion, may publish in orders, in whole or in part, or in substance, the report of the court upon the subject of the inquiry, with the opinion, if any, and the determination had or action taken thereon. Upon considerations, however, of policy or justice, the President or commander may, in his discretion, delay the publication, or omit altogether the publication of, the report, etc., or may publish the result alone, as, for example, that it is determined that no further proceedings are called for in the case.

SECTION VI.

RECORD.

473. How AUTHENTICATED.—Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signature of the president and the recorder thereof. In case the record can not be authenticated by the recorder, by reason of his death, disability, or absence, it shall be signed by the president and by one other member of the court. (A. W. 103.)

474. DISPOSITION OF.—The record shall be forwarded to the reviewing authority. (A. W. 103.) Should the court be appointed by the President the proceedings will be sent direct to the Judge Advocate General of the Army. To his office will be forwarded the original proceedings of all courts of inquiry with the decisions and orders of the reviewing authority made thereon, accompanied by five copies of the order publishing the case, if there be any, also a copy of every subsequent order affecting the case. When more than one case is embraced in a single order, a sufficient number of copies will be forwarded to enable one to be filed with each record.

475. ADMISSIBLE IN EVIDENCE.—The record of the proceedings of a court of inquiry may be read in evidence before any court-martial or military commission in any case not capital nor extending to the dismissal of an officer, and may also be read in evidence in any proceeding before a court of inquiry or a military board: *Provided*, That such evidence may be adduced by the defense in capital cases or cases extending to the dismissal of an officer. (A. W. 27. See par. 272.)

CHAPTER XIX.

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SECTION I.

PURPOSE OF WRIT.

476. TO DETERMINE LEGALITY OF RESTRAINT.—The purpose of the writ of habeas corpus is to bring the person seeking the benefit of it before the court or judge to determine whether or not he is illegally restrained of his liberty. It is a summary remedy for unlawful restraint of liberty and it can not be made use of to perform the function of a writ of error or an appeal. Where it is decided that the restraint is unlawful he is ordered released, but if the restraint is lawful the writ is dismissed. If the restraint be by virtue of legal process, the validity and present force of such process are the only subjects of investigation.

SECTION II.

WHERE RESTRAINT IS BY THE UNITED STATES.

477. STATE COURT WITHOUT AUTHORITY.—A State court is without authority to inquire into the legality of the restraint

where it appears that the custody is by virtue "of the authority of the United States," the principle being that no State can authorize one of its judges or courts to exercise judicial power, by habeas corpus, within the jurisdiction of another and independent government. No State judge or court, after they are judicially informed that the party is held under the authority of the United States, has any right to interfere with him or to require him to be brought before them. (Robb *v.* Connolly, 111 U. S., 624, 632; Ableman *v.* Booth, 21 How., 506, 514; Tarble's case, 13 Wall., 397, 409.) If a party thus held be illegally imprisoned, it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release. (Tarble's case, 13 Wall., 397, 411.)

Section III.

RETURN TO WRIT ISSUED BY STATE COURT.

478. To Show Authority for Restraint.—The return should be sufficient in its detail of facts to show distinctly that the imprisonment is under the authority, or claim and color of the authority, of the United States and to exclude the suspicion of imposition or oppression on the part of the officer making the return. The process or orders under which the petitioner is held should be produced with the return and submitted to inspection in order that the court or the judge issuing the writ may see that the officer is acting in good faith, under the authority or claim and color of authority of the United States, and not under the mere pretense of having such authority. (Tarble's case, 13 Wall., 397, 409; Covell *v.* Heyman, 111 U. S., 176, 183.)

(*a*) *Witness Held Under Warrant of Attachment.*—Where the petitioner is a civilian who has been apprehended under a warrant of attachment to be taken before a court-martial to testify as a witness, the officer making the return to the writ issued by a State court or judge will not produce the body, but will, by his return, set forth fully the authority by which he holds the person and allege that the State court, or judge, issuing the writ is without jurisdiction to

issue the same and ask to have it dismissed. He will exhibit to the court or judge issuing the writ of habeas corpus the warrant of attachment and the subpœna (and the proof of service of the subpœna) on which the warrant of attachment was based, and also a certified copy of the order convening the court-martial before which the witness was subpœnaed to testify, together with a copy of the charges and specifications in the case in which he was subpœnaed to testify, and an affidavit showing that the witness has failed to appear in response to such subpœna.

NOTE.—For form of return see Form B, Appendix 22.

(*b*) *Enlisted Man or General Prisoner.*—The return to a writ of habeas corpus issued by a State court or judge to produce an enlisted man or a general prisoner and show cause for his detention will show in writing that the subject of the writ is a duly enlisted soldier of the United States or a general prisoner, as the case may be, and set forth fully the cause of his detention, but the officer making the return will decline to produce in court the body of the prisoner named in the writ, giving as a reason for such refusal the fact that the Supreme Court of the United States has decided that a State court or judge has no jurisdiction in such a case.

NOTE.—For form of return see Form D, Appendix 22. A deserter apprehended by a civil officer authorized by a statute of the United States to apprehend deserters is in the custody of the United States. (See U. S. *v.* Reaves, 126 Fed. Rep., 127.)

SECTION IV.

RETURN TO WRIT ISSUED BY A UNITED STATES COURT.

479. CONTENTS.—A writ of habeas corpus issued by a United States court or judge will be promptly obeyed. The person alleged to be illegally restrained of his liberty will be taken before the court from which the writ has issued and a return made, setting forth the reasons for his restraint. The officer upon whom such writ is served will at once report the fact of such service by telegraph direct to The Adjutant General of the Army and the commanding general of the

corps area or department, stating briefly the grounds on which the release of the party is sought.

NOTE.—For form where a civilian witness is held under warrant of attachment, see Form A, Appendix 22. For form where an enlisted man or general prisoner is held, see Form C, Appendix 22. For brief of authorities when writ is applied for on grounds of age, see Appendix 22.

SECTION V.

WRIT ISSUED IN THE PHILIPPINE ISLANDS.

480. WHEN RETURN CONCLUSIVE.—It shall be a conclusive answer to a writ of habeas corpus against a military officer or soldier and a sufficient excuse for not producing the prisoner if the commanding general or any general officer in command of the department or district shall certify that the prisoner is held by him either—

(*a*) As a prisoner of war; or

(*b*) As a member of the Army, civilian employee thereof, or a camp follower and subject to its discipline; or

(*c*) As a prisoner guilty of violation of the laws of war committed in any unpacified province or territory and who has escaped into provinces officially declared to be under civil control and has been there captured by military authorities and is held for trial for such violations of the laws of war.

NOTE.—Section 1, Act No. 272, Philippine Commission, October 21, 1901, and section 4, Act No. 421, id., June 23, 1902. Respectful return in writing will be made in the case of prisoners who may be exempted from jurisdiction by the provisions of these acts stating the facts of the case, but the body of the prisoner will not be produced. In all other cases the return will be made and the body produced before the proper tribunal.

CHAPTER XX.

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SECTION I.

MISCELLANEOUS PROVISIONS.

481. INJURIES TO PERSONS OR PROPERTY—REDRESS.—Article 105 imposes upon a commanding officer, upon receipt of a complaint that damage has been done to the property of any person, or that his property has been wrongfully taken, by any person subject to military law, the duty to convene a board of officers consisting of any number from one to three to investigate the complaint. The article provides the administrative machinery by which money reparation for acts of waste, spoil, destruction, or depredation, denounced in A. W. 89 as offenses, shall be made effective. The article is not limited to the injuries covered by A. W. 89, but includes also other forms of damage to, and wrongful taking of, property, including negligent injuries thereto. (Dig. Ops. J. A. G., April, 1918, p. 8.) The complaint will more properly be made in writing by the injured party or his representative, and should set forth the details of the injury and be sustained by evidence showing it to be meritorious and well founded; and this evidence may also properly be required to be exhibited in the form of affidavits or written statements. It is competent, however, for a commanding officer, apprised

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by the report of any person in the military service, or by the oral complaint of the party injured, of any such damage, to proceed with the investigation as here outlined in case of written complaint submitted by or in behalf of the party in-injured and supported by affidavits or written statement. The board will be convened with the least practicable delay, is empowered to summon witnesses, examine them under oath or affirmation, receive depositions or other documentary evidence, and assess the damages against the person or persons determined to be responsible for the damage or wrongful taking. The board's assessment of damages is subject to the approval of the commanding officer and an assessment thus approved will be stopped against the pay of the offender. The order of the commanding officer directing stoppages authorized by the article is conclusive on any disbursing officer for the payment by him to the injured party of the stoppages.

The occasions for resorting to the procedure under this article are more frequent in a period pending or immediately succeeding a time of war, or during field operations and maneuvers. As the absolute identity of the guilty parties can not always be determined, the article further provides that in such a case, and when the organization or detachment to which they belong is known, stoppages to the amount of damages inflicted may be made and assessed in such proportion as may be deemed just upon the individual members thereof who are shown to have been present with such organization, or detachment at the time the damages complained of were inflicted, as determined by the approved findings of the board.

The guilty parties may be tried and punished for the military offense involved in his and their act under A. W. 89, quite irrespectively of any proceeding for the reparation of the parties injured had under this article. A trial, however, will preferably be first ordered, since, if reparation be subsequently sought to be made, the commander and the board will have the benefit of any material facts developed upon the original investigation. So, if the accused be acquitted, such acquittal will furnish persuasive but not necessarily

conclusive ground for not favorably entertaining the complaint or for reducing the amount to be assessed.

482. Effects of Deceased Person—Disposition of.—In case of the death of any person subject to military law, the commanding officer of the place of command will permit the legal representative or widow of the deceased, if present, to take possession of all his effects then in camp or quarters; and if no legal representative or widow be present, the commanding officer shall direct a summary court to secure all such effects, and said summary court shall have authority to collect and receive any debts due decedent's estate by local debtors and to pay the undisputed local creditors of decedent in so far as any money belonging to the deceased which may come into said summary court's possession under this article will permit, taking receipts therefor for file with said court's final report upon its transactions to the War Department; and as soon as practicable after the collection of such effects said summary court shall transmit such effects and any money collected, through the Quartermaster Department, at Government expense, to the widow or legal representative of the deceased, if such be found by said court or to the son, daughter, father, provided the father has not abandoned the support of his family, mother, brother, sister, or next of kin in the order named, if such be found by said court, or the beneficiary named in the will of the deceased, if such be found by said court, and said court shall thereupon make to the War Department a full report of its transactions; but if there be none of the persons hereinabove named, or such persons or their addresses are not known to, or readily ascertainable by said court, and the said court shall so find, said summary court shall have authority to convert into cash, by public or private sale, not earlier than thirty days after the death of the deceased, all effects of the deceased except sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes; and as soon as practicable after converting such effects into cash said summary court shall deposit with the proper officer, to be designated in regulations, any cash belonging to decedent's estate, and shall transmit a receipt for such deposits, any will or other papers of value belonging to

the deceased, any sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes, together with an inventory of the effects secured by said summary court, and a full account of its transactions, to the War Department for transmission to the Auditor for the War Department for action as authorized by law in the settlement of the accounts of deceased officers and enlisted men of the Army.

The provisions of this article shall be applicable to inmates of the United States Soldiers' Home who die in any United States military hospital outside of the District of Columbia where sent from the home for treatment. **(A. W. 112.)**

483. INQUESTS.—Article 113 imposes upon the summary court-martial the principal duties of the office of coroner at common law, viz, to investigate the cause of sudden, violent, and unnatural deaths. When a person is found dead at a place described in the article, and there is reasonable belief that his death has occurred from violence or other unlawful means, the commanding officer will immediately designate and direct a summary court-martial to investigate the circumstances attending the death, to the end that the cause thereof may be determined and the persons criminally responsible therefor may be brought to justice. The summary court-martial will with the least practicable delay view the body of the deceased and summon and examine, under oath or affirmation, such witnesses as may have knowledge of the cause and circumstances of the death. The summary court-martial should warn every person testifying at the inquest who is accused or suspected that he is not required to give evidence incriminating himself, and that any statement or evidence he gives may be used against him in the event of any further proceedings being instituted. If expert medical testimony is necessary, the commanding officer will, at the request of the summary court-martial, direct a medical officer to make such examination of the body of the deceased as may be necessary and to appear as a witness at the inquest. The testimony of each witness will be reduced to writing, and will, except when stenographically reported, be subscribed by him, and will be appended to the report of the inquest.

If the body of the deceased shows wounds or bruises such as to indicate or create suspicion that he came to his death by violent means, it shall be the duty of the summary court-martial to ascertain with as much exactness as possible the precise nature of the wounds or blows and the character of the instrument by which the wounds were inflicted; the person or persons by whom the fatal blow or blows were dealt; if there were any aiders or abettors; and such other particulars as may afford the means of drawing up, with the precision required by law, the necessary charges and specifications against the person or persons accused of the homicide.

The summary court officer will render a written report of his investigation to the post or other commanding officer, which report will state his finding as to the cause of the death and the names of the persons criminally responsible therefor, if in his opinion there be any such. Such persons, though not subject to military law, may, if found at any post over which the United States has exclusive jurisdiction, be confined by the commanding officer for such time as may be necessary for their delivery to the civil authorities. If such persons are subject to military law and appear to be guilty of an offense not triable by court-martial, they will be confined by the commanding officer, who will immediately furnish the proper United States district attorney with a copy of the findings of the summary court officer.

If the person over whose body the inquest is held is not identified as an officer or soldier, the report of the summary court-martial shall give a description of the deceased, which shall specify the name, if known, the apparent age, the sex, the color of the eyes and hair, and all marks or other particulars which may assist in the identification of the person.

NOTE.—For form of report of inquest see Appendix 26.

484. REMOVAL OF CIVIL SUITS.—When any civil suit or criminal prosecution is commenced in any court of a State against any officer, soldier, or other person in the military service of the United States on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting the military forces thereof, or under the

law of war, such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States in the district where the same is pending in the manner prescribed in section 33 of the act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911 (36 Stat. 1097), and the cause shall thereupon be entered on the docket of said district court and shall proceed therein as if the cause had been originally commenced in said district court and the same proceedings had been taken in such suit or prosecution in said district court as shall have been had therein in said State court prior to its removal, and said district court shall have full power to hear and determine said cause. (A. W. 117.)

485. Complaints of Wrongs.—Any officer or soldier who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redress, may complain to the general commanding in the locality where the officer against whom the complaint is made is stationed. The general shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department of War a true statement of such complaint, with the proceedings had thereon. (A. W. 121.)

486. Articles of War—When Effective.—Chapter II of the act of Congress entitled "An act to amend an act entitled 'An act for making further and more effectual provision for the national defense, and for other purposes,' approved June 3, 1916, and to establish military justice," approved June 4, 1920, repeals section 1342 of the Revised Statutes of the United States and contains the Articles of War. It is provided by section 2 of the act cited that the provisions of Chapter II of that act shall take effect and be in force eight months after the approval of that act: Provided, That articles 2, 23, and 45 shall take effect immediately.

Section II.

TRANSITORY PROVISION.

487. Prior Offenses Subject to Previous Laws.—It is provided by section 3 of the act of Congress entitled "An act to

amend an act entitled 'An act for making further and more effectual provision for the national defense and for other purposes,' approved June 3, 1916, and to establish military justice," approved June 4, 1920, that all offenses committed and all penalties, forfeitures, fines, or liabilities incurred prior to the taking effect of Chapter II of that act, under any law embraced in or modified, changed, or repealed by Chapter II of that act, may be prosecuted, punished, and enforced in the same manner and with the same effect as if that act had not been passed.

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Art. 62. Disrespect toward the President, Vice President, Congress, Secretary of War, governors, legislatures.
Art. 63. Disrespect toward superior officers.
Art 64. Assaulting or willfully disobeying superior officer.

III. PUNITIVE ARTICLES—Continued.

(c) *Disrespect; insubordination; Mutiny*—Continued.

Art. 65. Insubordinate conduct toward noncommissioned officer.

Art. 66. Mutiny or sedition.

Art. 67. Failure to suppress mutiny or sedition.

Art. 68. Quarrels; frays; disorders.

(d) *Arrest; confinement*—

Art. 69. Arrest or confinement.

Art. 70. Charges; action upon.

Art. 71. Refusal to receive and keep prisoners.

Art. 72. Report of prisoners received.

Art. 73. Releasing prisoner without proper authority.

Art. 74. Delivery of offenders to civil authorities.

(e) *War offenses*—

Art. 75. Misbehavior before the enemy.

Art. 76. Compelling commander to surrender.

Art. 77. Improper use of countersign.

Art. 78. Forcing a safeguard.

Art. 79. Captured property to be secured for public service.

Art. 80. Dealing in captured or abandoned property.

Art. 81. Relieving, corresponding with, or aiding the enemy.

Art. 82. Spies.

(f) *Miscellaneous crimes and offenses*—

Art. 83. Military property—willful or negligent loss, damage, or wrongful disposition.

Art. 84. Waste or unlawful disposition of military property issued to soldiers.

Art. 85. Drunk on duty.

Art. 86. Misbehavior of sentinel.

Art. 87. Personal interest in sale of provisions.

Art. 88. Intimidation of persons bringing provisions.

Art. 89. Good order to be maintained and wrongs redressed.

Art. 90. Provoking speeches or gestures.

Art. 91. Dueling.

Art. 92. Murder—rape.

Art. 93. Various crimes.

Art. 94. Frauds against the Government.

Art. 95. Conduct unbecoming an officer and gentleman.

Art. 96. General article.

IV. COURTS OF INQUIRY:

Art. 97. When and by whom ordered.

Art. 98. Composition.

Art. 99. Challenges.

Art. 100. Oath of members and recorder.

Art. 101. Powers; procedure.

Art. 102. Opinion on merits of case.

Art. 103. Record of proceedings—how authenticated.

V. MISCELLANEOUS PROVISIONS:

Art. 104. Disciplinary powers of commanding officers.
Art. 105. Injuries to property—redress of.
Art. 106. Arrest of deserters by civil officials.
Art. 107. Soldiers to make good time lost.
Art. 108. Soldiers—separation from the service.
Art. 109. Oath of enlistment.
Art. 110. Certain articles to be read and explained.
Art. 111. Copy of record of trial.
Art. 112. Effects of deceased persons—disposition of.
Art. 113. Inquests.
Art. 114. Authority to administer oaths.
Art. 115. Appointment of reporters and interpreters.
Art. 116. Powers of assistant trial judge advocate and of assistant defense counsel.
Art. 117. Removal of civil suits.
Art. 118. Officers—separation from service.
Art. 119. Rank and precedence among Regulars, Militia, and Volunteers.
Art. 120. Command when different corps or commands happen to join.
Art. 121. Complaints of wrongs.

NUMBERING OF ARTICLES OF WAR—CODE OF 1920 AND EARLIER CODES.

The present Articles of War are herein referred to as the Code of 1920.

(a) Code of 1920 and code of 1916.

The Code of 1920 retains the numbering of the Articles of War contained in the code of 1916, except that:

(1) Article 29 of the code of 1916 is the second paragraph of article 28 of the code of 1920.

(2) Article 29 of the code of 1920 is new. ("Court to announce action.")

(3) Article 50½ of code of 1920 is new. ("Review; rehearing.")

NOTE.—The following articles contain new matter of substance not in Articles of 1916 or omit similar matter which was therein:

2	21	38	57	94
4	23	40–43	68–70	104
5	24	45–50	75	112
6	27	50½	76	116
8	28–33	52	81	119
11–19	36	56	93	

Articles not appearing in the above list are either identical with the corresponding articles in the Code of 1916 or merely differ in details not affecting the substance (e. g., the word "trial" has been inserted in several sections before the words "judge advocate" for the sake of clarity).

(b) The relationship of the numbering of the articles in the code of 1916 to the prior code of 1874 and its various amendments is shown in the following table:

TABLE SHOWING NUMBERS OF ARTICLES IN THE CODE OF 1874 AND AMENDMENTS (OLD CODE), AND OF CORRESPONDING ARTICLES IN THE CODE OF 1916.

OLD CODE AND CODE OF 1916.

Old number.	Code of 1916.	Old number.	Code of 1916.	Old number.	Code of 1916.	Old number.	Code of 1916.
1	.....	32	61	63	2	96	43
2	109, 110	33	61	64	2	97	42
3	55	34	61	65	69	98	41
4	108	35	61	66	69	99	118
5	56	36	.....	67	71	100	44
6	56	37	.....	68	72	101	.....
7	57	38	41, 85	69	73	102	40
8	57	39	86	70	70	103	39
9	79	40	61	71	70	104	46
10	.....	41	75	[1] 72	8	105	48
11	.....	42	75	[1] 73	8	106	48
12	56	43	76	74	11	107	48
13	56	44	77	[1] 75	5	108	48
14	56	45	81	76	.....	109	46
15	83	46	81	77	4	111	51
16	84	47	58	78	4	112	50
17	84	48	107	79	16	113	35
18	87	49	28	[1] 81	6, 9, 13	114	111
19	62	50	29, 60	[1] 82	6, 9, 13	115	97
20	63	51	59	[1] 83	13, 14	116	98
21	64	52	.....	84	19	117	100
22	66	53	.....	85	19	118	101
23	67	54	89, 105	86	32	119	102
24	68	55	89, 105	87	.....	120	103
25	90	56	88	88	18	121	27
26	91	57	78	89	21	122	120
27	91	58	92, 93	90	17	124	119
28	91	59	74	91	25	125	112
29	121	60	2, 94	92	19	126	112
30	121	61	95	93	20, 70	127	112
31	61	62	93, 96	95	31	128	110

[1] Old articles 72, 73, 75, 81, 82, and 83 were replaced by the act of Mar. 2, 1913 (37 Stat., 723), effective July 1, 1913.

NOTE.—The Code of 1920 (except arts. 2, 23, and 45, which took effect on June 4, 1920) becomes effective on February 4, 1921.

ARTICLES OF WAR.

These new Articles of War comprise, as above stated, the substance of the former Articles of War, as revised by the act approved August 29, 1916 (39 Stat. 619), referred to as the Code of 1916, as amended by the acts of Congress approved July 9, 1918 (40 Stat. 882), with reference to articles 52, 53, and 57; February 28, 1919 (40 Stat.

1211), with reference to article 50; and November 19, 1919 (41 Stat. 356), with reference to article 112; all of which were repealed by the present code (see sec. 4, Chap. II, act of June 4, 1920; 41 Stat. 812).

The existing amendments to the Code of 1916 as set forth in the acts approved July 9, 1918 (arts. 52, 53, 57), February 28, 1919 (art. 50), and November 19, 1919 (art. 112), are printed in *italics*, and the changes made by the Code of 1920 are printed in **bold-faced type.** The matter existing as contained in the Code of 1916 is printed in the ordinary roman type.

Where matter appearing in a former article has been omitted in the new article, reference is made thereto in a note following the new article, and where the new article is so changed in substance or form that it is impossible clearly to indicate the changes in this matter, the old article, or as much of it as necessary, is reproduced in the note. It is therefore possible in every case where the former article, as it existed immediately prior to the taking effect of the Code of 1920, is not given in a note, to reconstruct the same by omitting the matter in bold-faced type in the new article and making the changes to the remaining text called for by the note.

The article numbers in the new code correspond to those of the Code of 1916, except that, as above stated, article 29, Code of 1916, is in new article 28, and articles 29 and 50½, Code of 1920, are entirely new.

An index follows the text of the articles.

An Act To amend an Act entitled "An Act for making further and more effectual provision for the national defense, and for other purposes," approved June 3, 1916, and to establish military justice.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

* * * * * *

CHAPTER II.

The articles included in this section shall be known as the Articles of War and shall at all times and in all places govern the armies of the United States.

I. Preliminary Provisions.

Article 1. Definitions.—The following words when used in these articles shall be construed in the sense indicated in this article, unless the context shows that a different sense is intended, namely:

(a) The word "officer" shall be construed to refer to a commissioned officer;

(b) The word "soldier" shall be construed as including a noncommissioned officer, a private, or any other enlisted man;

(c) The word "company" shall be understood as including a troop or battery; and

(d) The word "battalion" shall be understood as including a squadron.

ART. 2. PERSONS SUBJECT TO MILITARY LAW.—The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law," or "persons subject to military law," whenever used in these articles: *Provided*, That nothing contained in this Act, except as specifically provided in Article 2, subparagraph (c), shall be construed to apply to any person under the United States naval jurisdiction unless otherwise specifically provided by law.

(a) All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft or order to obey the same;

(b) Cadets;

(c) Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President: *Provided*, That an officer or soldier of the Marine Corps when so detached may be tried by military court-martial for an offense committed against the laws for the government of the naval service prior to his detachment, and for an offense committed against these articles he may be tried by a naval court-martial after such detachment ceases;

(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both

within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;

(e) All persons under sentence adjudged by courts-martial;

(f) All persons admitted into the Regular Army Soldiers' Home at Washington, District of Columbia.

This article became effective on June 4, 1920.

II. COURTS-MARTIAL.

ART. 3. COURTS-MARTIAL CLASSIFIED.—Courts-martial shall be of three kinds, namely:

First, general courts-martial;

Second, special courts-martial; and

Third, summary courts-martial.

A. COMPOSITION.

ART. 4. WHO MAY SERVE ON COURTS-MARTIAL.—All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial. When appointing courts-martial the appointing authority shall detail as members thereof those officers of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament; and officers having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of the minority membership thereof.

ART. 5. GENERAL COURTS-MARTIAL.—General courts-martial may consist of any number of officers not less than five.

Art. 5, Code of 1916, read following word "officers": "from five to thirteen, inclusive; but they shall not consist of less than thirteen, when that number can be convened without manifest injury to the service."

ART. 6. SPECIAL COURTS-MARTIAL.—Special courts-martial may consist of any number of officers not less than three.

Art. 6, Code of 1916, read following word "officers": "from three to five, inclusive."

ART. 7. SUMMARY COURTS-MARTIAL.—A summary court-martial shall consist of one officer.

B. BY WHOM APPOINTED.

ART. 8. GENERAL COURT-MARTIAL.—The President of the United States, the commanding officer of a territorial division or department, the Superintendent of the Military Academy, the commanding officer of an army, an army corps, a division, or a separate brigade, and, when empowered by the President, the commanding officer of any district or of any force or body of troops may appoint general courts-martial; but when any such commander is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior competent authority, and no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution.

The authority appointing a general court-martial shall detail as one of the members thereof a law member, who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member. The law member, in addition to his duties as a member, shall perform such other duties as the President may by regulations prescribe.

ART. 9. SPECIAL COURTS-MARTIAL.—The commanding officer of a district, garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a brigade, regiment, detached battalion, or other detached command may appoint special courts-martial; but when any such commanding officer is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior authority, and may in any case be appointed by superior authority when by the latter deemed desirable; and no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution.

ART. 10. SUMMARY COURTS-MARTIAL.—The commanding officer of a garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a regiment, detached battalion, detached company, or other detachment may appoint summary courts-martial; but such summary courts-

martial may in any case be appointed by superior authority when by the latter deemed desirable: *Provided*, That when but one officer is present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him.

ART. 11. APPOINTMENT OF TRIAL JUDGE ADVOCATES AND COUNSEL.—For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel, and for each general court-martial one or more assistant trial judge advocates and one or more assistant defense counsel when necessary: *Provided*, *however*, That no officer who has acted as member, trial judge advocate, assistant trial judge advocate, defense counsel, or assistant defense counsel in any case shall subsequently act as staff judge advocate to the reviewing or confirming authority upon the same case.

C. JURISDICTION.

ART. 12. GENERAL COURTS-MARTIAL.—General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals: *Provided*, That no officer shall be brought to trial before a general court-martial appointed by the Superintendent of the Military Academy: *Provided further*, That the officer competent to appoint a general court-martial for the trial of any particular case may, when in his judgment the interest of the service shall so require, cause any case to be tried by a special court-martial notwithstanding the limitations upon the jurisdiction of the special court-martial as to offenses set out in article 13; but the limitations upon jurisdiction as to persons and upon punishing power set out in said article shall be observed.

ART. 13. SPECIAL COURTS-MARTIAL.—Special courts-martial shall have power to try any person subject to military law for any crime or offense not capital made punishable by these articles: *Provided*, That the President may, by regulations, except from the jurisdiction of special courts-martial any class or classes of persons subject to military law.

Special courts-martial shall not have power to adjudge confinement in excess of six months, nor to adjudge forfeiture of more than two-thirds pay per month for a period of not exceeding six months.

Art. 13, Code of 1916, read as follows:

"ART. 13. SPECIAL COURTS-MARTIAL. — Special courts-martial shall have power to try any person subject to military law, except an officer, for any crime or offense not capital made punishable by these articles: *Provided,* That the President may, by regulations, which he may modify from time to time, except from the jurisdiction of special courts-martial any class or classes of persons subject to military law.

"Special courts-martial shall not have power to adjudge dishonorable discharge, nor confinement in excess of six months, nor to adjudge forfeiture of more than six months' pay."

ART. 14. SUMMARY COURTS-MARTIAL.—Summary courts-martial shall have power to try any person subject to military law, except an officer, a member of the Army Nurse Corps, a warrant officer, an Army field clerk, a field clerk Quartermaster Corps, a cadet, or a soldier holding the privileges of a certificate of eligibility to promotion, for any crime or offense not capital made punishable by these articles: *Provided*, That noncommissioner officers shall not, if they object thereto, be brought to trial before a summary court-martial without the authority of the officer competent to bring them to trial before a general court-martial: *Provided further*, That the President may, by regulations, except from the jurisdiction of summary courts-martial any class or classes of persons subject to military law.

Summary courts-martial shall not have power to adjudge confinement in excess of one month, restriction to limits for more than three months, or forfeiture or detention of more than two-thirds of one month's pay.

The words "which he may modify from time to time," which followed the word "regulations," in the second proviso of the first paragraph, have been omitted. The second paragraph of art. 14, Code of 1916, read as follows:

"Summary courts-martial shall not have power to adjudge confinement in excess of three months, nor to adjudge the forfeiture of more than three months' pay: *Provided,* That when the summary court officer is also the commanding officer no sentence of such summary court-martial adjudging confinement at hard labor or forfeiture of pay, or both, for a period in excess of one month shall be carried into execution until the same shall have been approved by superior authority."

ART. 15. JURISDICTION NOT EXCLUSIVE.—The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions,

provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war be triable by such military commissions, provost courts, or other military tribunals.

The word "lawfully" appeared in the former article, preceding the word "triable."

ART. 16. OFFICERS; HOW TRIABLE.—Officers shall be triable only by general and special courts-martial, and in no case shall an officer, when it can be avoided, be tried by officers inferior to him in rank.

D. PROCEDURE.

ART. 17. TRIAL JUDGE ADVOCATE TO PROSECUTE; COUNSEL TO DEFEND.—The trial judge advocate of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of its proceedings. The accused shall have the right to be represented in his defense before the court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel duly appointed for the court pursuant to article 11. Should the accused have counsel of his own selection, the defense counsel and assistant defense counsel, if any, of the court, shall, if the accused so desires, act as his associate counsel.

Article 17, Code of 1916, read as follows:

"ART. 17. JUDGE ADVOCATE TO PROSECUTE.—The judge advocate of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of its proceedings. The accused shall have the right to be represented before the court by counsel of his own selection for his defense, if such counsel be reasonably available, but should he, for any reason, be unrepresented by counsel, the judge advocate shall from time to time throughout the proceedings advise the accused of his legal rights."

ART. 18. CHALLENGES.—Members of a general or special court-martial may be challenged by the accused or the trial judge advocate for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time. Challenges by the trial judge advocate shall ordinarily be presented and decided before those by the accused are offered. Each side

shall be entitled to one peremptory challenge; but the law member of the court shall not be challenged except for cause.

The words "but only" appeared in the former article, preceding the words "for cause" in the first sentence.

ART. 19. OATHS.—The trial judge advocate of a general or special court-martial shall administer to the members of the court, before they proceed upon any trial, the following oath or affirmation: "You, A. B., do swear (or affirm) that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear (or affirm) that you will not divulge the findings or sentence of the court until they shall be published by the proper authority or duly announced by the court, except to the trial judge advocate and assistant trial judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial upon a challenge or upon the findings or sentence, unless required to give evidence thereof as a witness by a court of justice in due course of law. So help you God."

When the oath or affirmation has been administered to the members of a general or special court-martial, the president of the court shall administer to the trial judge advocate and to each assistant trial judge advocate, if any, an oath or affirmation in the following form: "You A. B., do swear (or affirm) that you will faithfully and impartially perform the duties of a trial judge advocate, and will not divulge the findings or sentence of the court to any but the proper authority until they shall be duly disclosed. So help you God."

All persons who give evidence before a court-martial shall be examined on oath or affirmation in the following form: "You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God."

Every reporter of the proceedings of a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: "You swear (or affirm) that you will faithfully perform the duties of reporter to this court. So help you God."

Every interpreter in the trial of any case before a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: "You swear (or affirm) that you will truly interpret in the case now in hearing. So help you God."

In case of affirmation the closing sentence of adjuration will be omitted.

The words "by the same," concluded the first sentence of the second paragraph of the former article.

ART. 20. CONTINUANCES.—A court-martial may, for reasonable cause, grant a continuance to either party for such time and as often as may appear to be just.

ART. 21. REFUSAL OR FAILURE TO PLEAD.—When an accused arraigned before a court-martial fails or refuses to plead, or answers foreign to the purpose, or after a plea of guilty makes a statement inconsistent with the plea, or when it appears to the court that he entered a plea of guilty improvidently or through lack of understanding of its meaning and effect, the court shall proceed to trial and judgment as if he had pleaded not guilty.

Art. 21, Code of 1916, read as follows:

"ART. 21. REFUSAL TO PLEAD.—When the accused, arraigned before a court-martial, from obstinacy and deliberate design stands mute or answers foreign to the purpose, the court may proceed to trial and judgment as if he had pleaded not guilty."

ART. 22. PROCESS TO OBTAIN WITNESSES.—Every trial judge advocate of a general or special court-martial and every summary court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of the United States, having criminal jurisdcition, may lawfully issue; but such process shall run to any part of the United States, its Territories, and possessions.

ART. 23. REFUSAL TO APPEAR OR TESTIFY.—Every person not subject to military law who, being duly subpœnaed to appear as a witness before any military court, commission, court of inquiry, or board, or before any officer, military or civil,

designated to take a deposition to be read in evidence before such court, commission, court of inquiry, or board, willfully neglects or refuses to appear, or refuses to qualify as a witness, or to testify, or produce documentary evidence which such person may have been legally subpœnaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States or in a court of original criminal jurisdiction in any of the territorial possessions of the United States, jurisdiction being hereby conferred upon such courts for such purpose; and it shall be the duty of the United States district attorney or the officer prosecuting for the Government in any such court of original criminal jurisdiction, on the certification of the facts to him by the military court, commission, court of inquiry, or board, to file an information against and prosecute the person so offending, and the punishment of such person, on conviction, shall be a fine of not more than $500 or imprisonment not to exceed six months, or both, at the discretion of the court: *Provided*, That the fees of such witness and his mileage, at the rates allowed to witnesses attending the courts of the United States, shall be duly paid or tendered said witness, such amounts to be paid out of the appropriation for the compensation of witnesses: *Provided further*, That every person not subject to military law, who before any court-martial, military tribunal, or military board, or in connection with, or in relation to any proceedings or investigation before it or had under any of the provisions of this act, is guilty of any of the acts made punishable as offenses against public justice by any provision of chapter 6 of the Act of March 4, 1909, entitled "An Act to codify, revise, and amend the penal laws of the United States" (volume 35, United States Statutes at Large, page 1088), or any amendment thereof, shall be punished as therein provided.

This article became effective on June 4, 1920.

ART. 24. COMPULSORY SELF-INCRIMINATION PROHIBITED.—No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court,

commission, court of inquiry, or board, or before an officer conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to degrade him.

Art. 24, Code of 1916, read as follows:

"ART. 24. COMPULSORY SELF-INCRIMINATION PROHIBITED.—No witness before a military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, shall be compelled to incriminate himself or to answer any questions which may tend to incriminate or degrade him."

ART. 25. DEPOSITIONS—WHEN ADMISSIBLE.—A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, if such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or District in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to appear and testify in person at the place of trial or hearing: *Provided*, That testimony by deposition may be adduced for the defense in capital cases.

ART. 26. DEPOSITIONS—BEFORE WHOM TAKEN.—Depositions to be read in evidence before military courts, commissions, courts of inqury, or military boards, or for other use in military administration, may be taken before and authenticated by any officer, military or civil, authorized by the laws of the Unted States or by the laws of the place where the deposition is taken to administer oaths.

ART. 27. COURTS OF INQUIRY—RECORDS OF, WHEN ADMISSIBLE.—The record of the proceedings of a court of inquiry may, with the consent of the accused, be read in evidence before any court-martial or military commission in any case not capital nor extending to the dismissal of an

officer, and may also be read in evidence in any proceeding before a court of inquiry or a military board: *Provided*, That such evidence may be adduced by the defense in capital cases or cases extending to the dismissal of an officer.

ART. 28. **CERTAIN ACTS TO CONSTITUTE DESERTION.**—Any officer who, having tendered his resignation and prior to due notice of the acceptance of the same, quits his post or proper duties without leave and with intent to absent himself permanently therefrom shall be deemed a deserter.

Any soldier who, without having first received a regular discharge, again enlists in the Army, or in the militia when in the service of the United States, or in the Navy or Marine Corps of the United States, or in any foreign army, shall be deemed to have deserted the service of the United States; and where the enlistment is in one of the forces of the United States mentioned above, to have fraudulently enlisted therein.

Any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter.

The first paragraph is the same as art. 28, Code of 1916, except that the former title of that article was "Resignation without acceptance does not release officer." The second paragraph is the same as art. 29, Code of 1916. The third paragraph is new.

ART. 29. **COURT TO ANNOUNCE ACTION.**—Whenever the court has acquitted the accused upon all specifications and charges, the court shall at once announce such result in open court. Under such regulations as the President may prescribe, the findings and sentence in other cases may be similarly announced.

ART. 30. CLOSED SESSIONS.—Whenever a general or special court-martial shall sit in closed session, the trial judge advocate and the assistant trial judge advocate, if any, shall withdraw; and when their assistance in referring to the recorded evidence is required, it shall be obtained in open court, and in the presence of the accused and of his counsel, if there be any.

The words "their legal advice or" appeared in the former article, following the word "when."

ART. 31. **METHOD OF VOTING.**—Voting by members of a general or special court-martial upon questions of challenge, on the findings, and on the sentence shall be by secret written ballot. The junior member of the court shall in each case count the votes,

which count shall be checked by the president, who will forthwith announce the result of the ballot to the members of the court. The law member of the court, if any, or if there be no law member of the court, then the president, may rule in open court upon interlocutory questions, other than challenges, arising during the proceedings: *Provided*, That unless such ruling be made by the law member of the court if any member object thereto the court shall be cleared and closed and the question decided by a majority vote, viva voce, beginning with the junior in rank: *And provided further*, That if any such ruling be made by the law member of the court upon any interlocutory question other than an objection to the admissibility of evidence offered during the trial, and any member object to the ruling, the court shall likewise be cleared and closed and the question decided by a majority vote, viva voce, beginning with the junior in rank: *Provided further, however*, That the phrase, "objection to the admissibility of evidence offered during the trial," as used in the next preceding proviso hereof, shall not be construed to include questions as to the order of the introduction of witnesses or other evidence, nor of the recall of witnesses for further examination, nor as to whether expert witnesses shall be admitted or called upon any question, nor as to whether the court shall view the premises where an offense is alleged to have been committed, nor as to the competency of witnesses, as, for instance, of children, witnesses alleged to be mentally incompetent, and the like, nor as to the insanity of accused, or whether the existence of mental disease or mental derangement on the part of the accused has become an issue in the trial, or accused required to submit to physical examination, nor whether any argument or statement of counsel for the accused or of the trial judge advocate is improper, nor any ruling in a case involving military strategy or tactics or correct military action; but, upon all these questions arising on the trial, if any member object to any ruling of the law member, the court shall be cleared and closed and the question decided by majority vote of the members in the manner aforesaid.

Art. 31, Code of 1916, read as follows:

"ART. 31. ORDER OF VOTING.—Members of a general or special court-martial, in giving their votes, shall begin with the junior in rank."

ART. 32. CONTEMPTS.—A military tribunal may punish as for contempt any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder: *Provided*, That such punishment shall in no case exceed one month's confinement, or a fine of $100, or both.

Art. 32, Code of 1916, read as follows:
"ART. 32. CONTEMPTS.—A court-martial may punish at discretion, subject to the limitations contained in article fourteen, any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder."

ART. 33. RECORDS—GENERAL COURTS-MARTIAL.—Each general court-martial shall keep a separate record of its proceedings in the trial of each case brought before it, and such record shall be authenticated by the signature of the president and the trial judge advocate; but in case the record can not be authenticated by the president and trial judge advocate, by reason of the death, disability, or absence of either or both of them, it shall be signed by a member in lieu of the president and by an assistant trial judge advocate, if there be one, in lieu of the trial judge advocate; otherwise by another member of the court.

Art. 33, Code of 1916, following the semicolon, read as follows:
" but in case the record can not be authenticated by the judge advocate, by reason of his death, disability, or absence, it shall be signed by the president and an assistant judge advocate, if any; and if there be no assistant judge advocate, or in case of his death, disability, or absence, then by the president and one other member of the court."

ART. 34. RECORDS—SPECIAL AND SUMMARY COURTS-MARTIAL.—Each special court-martial and each summary court-martial shall keep a record of its proceedings, separate for each case, which record shall contain such matter and be authenticated in such manner as may be required by regulations which the President may from time to time prescribe.

ART. 35. DISPOSITION OF RECORDS—GENERAL COURTS-MARTIAL.—The trial judge advocate of each general court-martial shall, with such expedition as circumstances may permit, forward to the appointing authority or to his successor in command the original record of the proceedings of such court in the trial of each case. All records of such proceed-

ings shall, after having been acted upon, be transmitted to the Judge Advocate General of the Army.

The word "finally" appeared in the former article, preceding the word "acted."

ART. 36. DISPOSITION OF RECORDS—SPECIAL AND SUMMARY COURTS-MARTIAL.—After having been acted upon by the officer appointing the court, or by the officer commanding for the time being, the record of each trial by special court-martial and a report of each trial by summary court-martial shall be transmitted to such general headquarters as the President may designate in regulations, there to be filed in the office of the judge advocate. When no longer of use, records of summary courts-martial may be destroyed.

The words "special and" appeared in the former article, preceding the word "summary" in the last sentence.

ART. 37. IRREGULARITIES—EFFECT OF.—The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved, in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused: *Provided*, That the act or omission upon which the accused has been tried constitutes an offense denounced and made punishable by one or more of these articles: *Provided further*, That the omission of the words "hard labor" in any sentence of a court-martial adjudging imprisonment or confinement shall not be construed as depriving the authorities executing such sentence of imprisonment or confinement of the power to require hard labor as a part of the punishment in any case where it is authorized by the Executive order prescribing maximum punishments.

ART. 38. PRESIDENT MAY PRESCRIBE RULES.—The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, in so far as he shall deem practicable, apply the rules of

evidence generally recognized in the trial of criminal cases in the district courts of the United States: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further*, That all rules made in pursuance of this article shall be laid before the Congress annually.

E. LIMITATIONS UPON PROSECUTIONS.

ART. 39. AS TO TIME.—Except for desertion committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before the arraignment of such person: *Provided*, That for desertion in time of peace or for any crime or offense punishable under articles ninety-three and ninety-four of this code the period of limitations upon trial and punishment by court-martial shall be three years: *Provided further*, That the period of any absence of the accused from the jurisdiction of the United States, and also any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice, shall be excluded in computing the aforesaid periods of limitation: *And provided further*, That this article shall not have the effect to authorize the trial or punishment for any crime or offense barred by the provisions of existing law.

ART. 40. AS TO NUMBER.—No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case.

No authority shall return a record of trial to any court-martial for reconsideration of—

(a) An acquittal; or

(b) A finding of not guilty of any specification; or

(c) A finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of war; or

(d) The sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.

And no court-martial, in any proceedings on revision, shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is hereinbefore prohibited.

F. PUNISHMENTS.

ART. 41. **CRUEL AND UNUSUAL PUNISHMENTS** PROHIBITED.—Cruel and unusual punishments of every kind, including flogging, branding, marking, or tattooing on the body, are prohibited.

Art. 41, Code of 1916, read as follows:

"ART. 41. CERTAIN KINDS PROHIBITED.—Punishment by flogging, or by branding, marking, or tattooing on the body is prohibited."

ART. 42. PLACES OF CONFINEMENT—WHEN LAWFUL.—Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall under the sentence of a court-martial be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia, or by way of commutation of a death sentence, and unless, also the period of confinement authorized and adjudged by such court-martial is more than one year: *Provided*, That when a sentence of confinement is adjudged by a court-martial upon conviction of two or more acts or omissions any one of which is punishable under these articles by confinement in a penitentiary, the entire sentence of confinement may be executed in a penitentiary: *Provided further*, That penitentiary confinement hereby authorized may be served in any penitentiary directly or indirectly under the jurisdiction of the United States: *Provided further*, That persons sentenced to dishonorable discharge and to confinement not in a penitentiary shall be confined in the United States Disciplinary Barracks or else-

where as the Secretary of War or the reviewing authority may direct, but not in a penitentiary.

The language between the words "offense of a civil nature" and the first proviso in Art. 42, Code of 1916, read as follows: "by some statute of the United States, or at the common law as the same exists in the District of Columbia, or by way of commutation of a death sentence, and unless, also, the period of confinement authorized and adjudged by such court-martial is one year or more:"

ART. 43. DEATH SENTENCE—WHEN LAWFUL.—No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court-martial present at the time the vote is taken, and for an offense in these articles expressly made punishable by death; nor sentence to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all of the members present at the time the vote is taken. All other convictions and sentences, whether by general or special court-martial, may be determined by a two-thirds vote of those members present at the time the vote is taken. All other questions shall be determined by a majority vote.

Art. 43, Code of 1916, read as follows:

"ART. 43. DEATH SENTENCE—WHEN LAWFUL.—No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of two-thirds of the members of said court-martial and for an offense in these articles expressly made punishable by death. All other convictions and sentences, whether by general or special court-martial, may be determined by a majority of the members present."

ART. 44. COWARDICE; FRAUD—ACCESSORY PENALTY.—When an officer is dismissed from the service for cowardice or fraud, the crime, punishment, name, and place of abode of the delinquent shall be published in the newspapers in and about the camp and in the State from which the offender came or where he usually resides; and after such publication it shall be scandalous for an officer to associate with him.

ART. 45. MAXIMUM LIMITS.—Whenever the punishment for a crime or offense made punishable by these articles is left to the discretion of the court-martial the punishment shall not exceed such limit or limits as the President may from time to time prescribe: *Provided*, That in time of peace the period of confinement in a penitentiary shall in no case exceed

the maximum period prescribed by the law which, under article 42 of these articles, permits confinement in a penitentiary, unless in addition to the offense so punishable under such law the accused shall have been convicted at the same time of one or more other offenses.

This article became effective on June 4, 1920. The words "in time of peace" appeared in the former article, preceding the word "exceed."

G. ACTION BY APPOINTING OR SUPERIOR AUTHORITY.

ART. 46. ACTION BY CONVENING AUTHORITY.—Under such regulations as may be prescribed by the President every record of trial by general court-martial or military commission received by a reviewing or confirming authority shall be referred by him, before he acts thereon, to his staff judge advocate or to the Judge Advocate General. No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being.

The former article was entitled, "Approval and execution of sentence."

ART. 47. POWERS INCIDENT TO POWER TO APPROVE.—The power to approve the sentence of a court-martial shall be held to include:

(a) The power to approve or disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to approve, the evidence of record requires a finding of only the lesser degree of guilt; and

(b) The power to approve or disapprove the whole or any part of the sentence.

(c) The power to remand a case for rehearing, under the provisions of article 50½.

ART. 48. CONFIRMATION—WHEN REQUIRED.—In addition to the approval required by article forty-six, confirmation by the President is required in the following cases before the sentence of a court-martial is carried into execution, namely:

(a) Any sentence respecting a general officer;

(b) Any sentence extending to the dismissal of an officer, except that in time of war a sentence extending to the dis-

missal of an officer below the grade of brigadier general may be carried into execution upon confirmation by the commanding general of the Army in the field or by the commanding general of the territorial department or division:

(c) Any sentence extending to the suspension or dismissal of a cadet; and

(d) Any sentence of death, except in the cases of persons convicted in time of war of murder, rape, mutiny, desertion, or as spies; and in such excepted cases a sentence of death may be carried into execution, subject to the provisions of article 50½, upon confirmation by the commanding general of the Army in the field or by the commanding general of the territorial department or division.

When the authority competent to confirm the sentence has already acted as the approving authority no additional confirmation by him is necessary.

ART. 49. POWERS INCIDENT TO POWER TO CONFIRM.—The power to confirm the sentence of a court-martial shall be held to include:

(a) The power to confirm or disapprove a finding, and to confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to confirm, the evidence of record requires a finding of only the lesser degree of guilt; and

(b) The power to confirm or disapprove the whole or any part of the sentence.

(c) The power to remand a case for rehearing, under the provisions of article 50½.

ART. 50. MITIGATION OF REMISSION OF SENTENCES.—The power to order the execution of the sentence adjudged by a court-martial shall be held to include, inter alia, the power to mitigate or remit the whole or any part of the sentence.

Any unexecuted portion of a sentence adjudged by a court-martial may be mitigated or remitted by the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States Disciplinary Barracks, in which the person under sentence is held, a court of the kind that imposed the sentence, and the same power may be

exercised by superior military authority; but no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority, *and no approved sentence of loss of files by an officer shall be remitted or mitigated by any authority inferior to the President, except as provided in the fifty-second article.*

When empowered by the President so to do, the commanding general of the Army in the field or the commanding general of the territorial department or division, may approve or confirm and commute (but not approve or confirm without commuting), *mitigate, or remit and* then *order executed as* commuted, *mitigated, or remitted any sentence which under these articles requires the confirmation of the President before the same may be executed.*

The power of remission on mitigation shall extend to all uncollected forfeitures adjudged by sentence of court-martial.

The last sentence of the former article read: "The power of remission and mitigation shall extend to all uncollected forfeitures adjudged by sentence of a court-martial."

ART. 50½. **REVIEW; REHEARING.**—The Judge Advocate General shall constitute, in his office, a board of review consisting of not less than three officers of the Judge Advocate General's Department.

Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President under the provisions of article 46, article 48, or article 51 is submitted to the President, such record shall be examined by the board of review. The board shall submit its opinion, in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the board's opinion, with his recommendations, directly to the Secretary of War for the action of the President.

Except as herein provided, no authority shall order the execution of any other sentence of a general court-martial involving the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, unless and until the board of review shall, with the approval of the Judge Advocate General, have held the record of trial upon which such sentence is based legally sufficient to support the

sentence; except that the proper reviewing or confirming authority may upon his approval of a sentence involving dishonorable discharge or confinement in a penitentiary order its execution if it is based solely upon findings of guilty of a charge or charges and a specification or specifications to which the accused has pleaded guilty. When the board of review, with the approval of the Judge Advocate General, holds the record in a case in which the order of execution has been withheld under the provisions of this paragraph legally sufficient to support the findings and sentence, the Judge Advocate General shall so advise the reviewing or confirming authority from whom the record was received, who may thereupon order the execution of the sentence. When in a case in which the order of execution has been withheld under the provisions of this paragraph, the board of review holds the record of trial legally insufficient to support the findings or sentence, either in whole or in part, or that errors of law have been committed injuriously affecting the substantial rights of the accused, and the Judge Advocate General concurs in such holding of the board of review, such findings and sentence shall be vacated in whole or in part in accord with such holding and the recommendations of the Judge Advocate General thereon, and the record shall be transmitted through the proper channels to the convening authority for a rehearing or such other action as may be proper. In the event that the Judge Advocate General shall not concur in the holding of the board of review, the Judge Advocate General shall forward all the papers in the case, including the opinion of the board of review and his own dissent therefrom, directly to the Secretary of War for the action of the President, who may confirm the action of the reviewing authority or confirming authority below, in whole or in part, with or without remission, mitigation, or commutation, or may disapprove, in whole or in part, any finding of guilty, and may disapprove or vacate the sentence, in whole or in part.

When the President or any reviewing or confirming authority disapproves or vacates a sentence the execution of which has not theretofore been duly ordered, he may authorize or direct a rehearing. Such rehearing shall take place before a court composed of officers not members of the court which first heard the

case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court, and no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding: *Provided*, That such rehearing shall be had in all cases where a finding and sentence have been vacated by reason of the action of the board of review approved by the Judge Advocate General holding the record of trial legally insufficient to support the findings or sentence or that errors of law have been committed injuriously affecting the substantial rights of the accused, unless, in accord with such action, and the recommendations of the Judge Advocate General thereon, the findings or sentence are approved in part only, or the record is returned for revision, or unless the case is dismissed by order of the reviewing or confirming authority. After any such rehearing had on the order of the President, the record of trial shall, after examination by the board of review, be transmitted by the Judge Advocate General, with the board's opinion and his recommendations, directly to the Secretary of War for the action of the President.

Every record of trial by general court-martial, examination of which by the board of review is not hereinbefore in this article provided for, shall nevertheless be examined in the Judge Advocate General's Office; and if found legally insufficient to support the findings and sentence, in whole or in part, shall be examined by the board of review, and the board, if it also finds that such record is legally insufficient to support the findings and sentence, in whole or in part, shall, in writing, submit its opinion to the Judge Advocate General, who shall transmit the record and the board's opinion, with his recommendations, directly to the Secretary of War for the action of the President. In any such case the President may approve, disapprove, or vacate, in whole or in part, any findings of guilty, or confirm, mitigate, commute, remit, or vacate any sentence, in whole or in part, and direct the execution of the sentence as confirmed or modified, and he may restore the accused to all rights affected by the findings and sentence, or part thereof, held to be invalid; and the President's necessary orders to this end shall be binding upon all departments and officers of the Government.

Whenever necessary, the Judge Advocate General may constitute two or more boards of review in his office, with equal powers and duties.

Whenever the President deems such action necessary, he may direct the Judge Advocate General to establish a branch of his office, under an Assistant Judge Advocate General, with any distant command, and to establish in such branch office a board of review, or more than one. Such Assistant Judge Advocate General and such board or boards of review shall be empowered to perform for that command, under the general supervision of the Judge Advocate General, the duties which the Judge Advocate General and the board or boards of review in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval or confirmation by the President.

ART. 51. SUSPENSION OF SENTENCES OF DISMISSAL OR DEATH.—The authority competent to order the execution of a sentence of dismissal of an officer or a sentence of death may suspend such sentence until the pleasure of the President be known, and in case of such suspension a copy of the order of suspension, together with a copy of the record of trial, shall immediately be transmitted to the President.

ART. 52. SUSPENSION OF SENTENCES.—The authority competent to order the execution of *the* sentence *of a court-martial* may, *at the time of the approval of such sentence*, suspend the execution, *in whole or in part, of any such sentence as does not extend to death, and may restore the person under sentence to duty during such suspension;* and the Secretary of War or the commanding officer holding general court-martial jurisdiction over any such offender, may at any time thereafter, while the sentence is being served, suspend the execution, in whole or in part, of the balance of such sentence and restore the person under sentence to duty during such suspension. *A sentence, or any part thereof, which has been so suspended may be remitted, in whole or in part, except in cases of persons confined in the United States Disciplinary Barracks or its branches, by the officer who suspended the same, by his successor in office, or by any officer exercising appropriate court-martial jurisdiction over the command in which the person*

under sentence may be serving at the time, and, subject to the foregoing exceptions, the same authority may vacate the order of suspension at any time and order the execution of the sentence or the suspended part thereof in so far as the same shall not have been previously remitted, **subject to like power of suspension.** *The death or honorable discharge of a person under a suspended sentence shall operate as a complete remission of any unexecuted or unremitted part of such sentence.*

ART. 53. *EXECUTION OR REMISSION—CONFINEMENT IN DISCIPLINARY BARRACKS.—When a sentence of dishonorable discharge has been suspended until the soldier's release from confinement, the execution or remission of any part of his sentence shall, if the soldier be confined in the United States Disciplinary Barracks, or any branch thereof, be directed by the Secretary of War.*

III. PUNITIVE ARTICLES.

A. ENLISTMENT; MUSTER; RETURNS.

ART. 54.—FRAUDULENT ENLISTMENT.—Any person who shall procure himself to be enlisted in the military service of the United States by means of willful misrepresentation or concealment as to his qualifications for enlistment, and shall receive pay or allowances under such enlistment, shall be punished as a court-martial may direct.

ART. 55. —OFFICER MAKING UNLAWFUL ENLISTMENT.—Any officer who knowingly enlists or musters into the military service any person whose enlistment or muster in is prohibited by law, regulations, or orders shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

ART. 56. FALSE MUSTER.—Any officer who knowingly makes a false muster of man or animal, or who signs or directs or allows the signing of any muster roll knowing the same to contain a false muster or false statement as to the absence or pay of an officer or soldier, or who wrongfully takes money or other consideration on mustering in a regiment, company,

or other organization, or on signing muster rolls, or who knowingly musters as an officer or soldier a person who is not such officer or soldier, shall be dismissed from the service and suffer such other punishment as a court-martial may direct.

This article is the same as the last sentence of art. 56, Code of 1916. The portion of the former article not retained read as follows:

"ART. 56. MUSTER ROLLS—FALSE MUSTER.—At every muster of a regiment, troop, battery, or company the commanding officer thereof shall give to the mustering officer certificates, signed by himself, stating how long absent officers have been absent and the reasons of their absence. And the commanding officer of every troop, battery, or company shall give like certificates, stating how long absent noncommissioned officers and private soldiers have been absent and the reasons of their absence. Such reasons and time of absence shall be inserted in the muster rolls opposite the names of the respective absent officers and soldiers, and the certificates, together with the muster rolls, shall be transmitted by the mustering officer to the Department of War as speedily as the distance of the place and muster will admit."

ART. 57. FALSE RETURNS—OMISSION TO RENDER RETURNS.—Every officer whose duty it is to render to the War Department or other superior authority a return of the state of the troops under his command, or of the arms, ammunition, clothing, funds, or other property thereunto belonging, who knowingly makes a false return thereof shall be dismissed from the service and suffer such other punishment as a court-martial may direct. And any officer who, through neglect or design, omits to render such return shall be punished as a court-martial may direct.

This article is the same as art. 57, Code of 1916, except that the first sentence of the former article, reading as follows, has been omitted:

"ART. 57. FALSE RETURNS—OMISSION TO RENDER RETURNS.—Every officer commanding a regiment, an independent troop, battery, or company, or a garrison shall, in the beginning of every month, transmit through the proper channels, to the Department of War, an exact return of the same."

B. DESERTION; ABSENCE WITHOUT LEAVE.

ART. 58. DESERTION.—Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.

ART. 59. ADVISING OR AIDING ANOTHER TO DESERT.—Any person subject to military law who advises or persuades or knowingly assists another to desert the service of the United

States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.

ART. 60. ENTERTAINING A DESERTER.—Any officer who, after having discovered that a soldier in his command is a deserter from the military or naval service or from the Marine Corps, retains such deserter in his command without informing superior authority or the commander of the organization to which the deserter belongs, shall be punished as a court-martial may direct.

ART. 61. ABSENCE WITHOUT LEAVE.—Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty, or goes from the same without proper leave, or absents himself from his command, guard, quarters, station, or camp without proper leave, shall be punished as a court-martial may direct.

C. DISRESPECT; INSUBORDINATION; MUTINY.

ART. 62. DISRESPECT TOWARD THE PRESIDENT, VICE PRESIDENT, CONGRESS, SECRETARY OF WAR, GOVERNORS, LEGISLATURES.—Any officer who uses contemptuous or disrespectful words against the President, Vice President, the Congress of the United States, the Secretary of War, or the governor or legislature of any State, Territory, or other possession of the United States in which he is quartered shall be dismissed from the service or suffer such other punishment as a court-martial may direct. Any other person subject to military law who so offends shall be punished as a court-martial may direct.

ART. 63. DISRESPECT TOWARD SUPERIOR OFFICER.—Any person subject to military law who behaves himself with disrespect toward his superior officer shall be punished as a court-martial may direct.

ART. 64. ASSAULTING OR WILLFULLY DISOBEYING SUPERIOR OFFICER.—Any person subject to military law who, on any pretense whatsoever, strikes his superior officer or draws or lifts up any weapon or offers any violence against him,

being in the execution of his office, or willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court-martial may direct.

ART. 65. INSUBORDINATE CONDUCT TOWARD NONCOMMISSIONED OFFICER.—Any soldier who strikes or assaults, or who attempts or threatens to strike or assault, or willfully disobeys the lawful order of a warrant officer or a noncommissioned officer while in the execution of his office, or uses threatening or insulting language, or behaves in an insubordinate or disrespectful manner toward a warrant officer or a noncommissioned officer while in the execution of his office, shall be punished as a court-martial may direct.

ART. 66. MUTINY OR SEDITION.—Any person subject to military law who attempts to create or who begins, excites, causes, or joins in any mutiny or sedition in any company, party, post, camp, detachment, guard, or other command shall suffer death or such other punishment as a court-martial may direct.

ART. 67. FAILURE TO SUPPRESS MUTINY OR SEDITION.—Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or knowing or having reason to believe that a mutiny or sedition is to take place, does not without delay give information thereof to his commanding officer shall suffer death or such other punishment as a court-martial may direct.

ART. 68. QUARRELS; FRAYS; DISORDERS.—All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks, Quartermaster Corps, and noncommissioned officers have power to part and quell all quarrels, frays, and disorders among persons subject to military law and to order officers who take part in the same into arrest, and other persons subject to military law who take part in the same into arrest or confinement, as circumstances may require, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer, nurse, band leader, warrant officer, field clerk, or noncommissioned officer, or draws a weapon upon or otherwise threatens or does violence to him, shall be punished as a court-martial may direct.

D. ARREST; CONFINEMENT.

ART. 69. ARREST OR CONFINEMENT.—Any person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest as circumstances may require; but when charged with a minor offense only such person shall not ordinarily be placed in confinement. Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer or cadet who breaks his arrest or who escapes from confinement, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be dismissed from the service or suffer such other punishment as a court-martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be punished as a court-martial may direct.

Art. 69, Code of 1916, reads as follows:

"ART. 69. ARREST OR CONFINEMENT OF ACCUSED PERSONS.—An officer charged with crime or with a serious offense under these articles shall be placed in arrest by the commanding officer, and in exceptional cases an officer so charged may be placed in confinement by the same authority. A soldier charged with crime or with a serious offense under these articles shall be placed in confinement, and when charged with a minor offense he may be placed in arrest. Any other person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest, as circumstances may require; and when charged with a minor offense such person may be placed in arrest. Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer who breaks his arrest or who escapes from confinement before he is set at liberty by proper authority shall be dismissed from the service or suffer such other punishment as a court-martial may direct, and any other person subject to military law who escapes from confinement or who breaks his arrest before he is set at liberty by proper authority shall be punished as a court-martial may direct."

ART. 70. CHARGES; ACTION UPON.—Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

No charge will be referred for trial until after a thorough and impartial investigation thereof shall have been made. This in-

vestigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

Before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice.

When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct. When a person is held for trial by general court-martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.

Art. 70, Code of 1916, read as follows:

"ART. 70. INVESTIGATION OF AND ACTION UPON CHARGES.—No person put in arrest shall be continued in confinement more than 8 days, or until such time as a court-martial can be assembled. When any person is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within 8 days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessi-

ties of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served, or the arrested person be not brought to trial, as herein required, the arrest shall cease. But persons released from arrest, under the provisions of this article, may be tried, whenever the exigencies of the service shall permit, within twelve months after such release from arrest: *Provided*, That in time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him."

ART. 71. REFUSAL TO RECEIVE AND KEEP PRISONERS.—No provost marshal or commander of a guard shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States, provided the officer committing shall, at the time, deliver an account in writing, signed by himself, of the crime or offense charged against the prisoner. Any officer or soldier so refusing shall be punished as a court-martial may direct.

ART. 72. REPORT OF PRISONERS RECEIVED.—Every commander of a guard to whose charge a prisoner is committed shall, within twenty-four hours after such confinement, or as soon as he is relieved from his guard, report in writing to the commanding officer the name of such prisoner, the offense charged against him, and the name of the officer committing him; and if he fails to make such report, he shall be punished as a court-martial may direct.

ART. 73. RELEASING PRISONER WITHOUT PROPER AUTHORITY.—Any person subject to military law who, without proper authority, releases any prisoner duly committed to his charge, or who through neglect or design suffers any prisoner so committed to escape, shall be punished as a court-martial may direct.

ART. 74. DELIVERY OF OFFENDERS TO CIVIL AUTHORITIES.—When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of

justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

When, under the provisions of this article, delivery is made to the civil authorities of an offender undergoing sentence of a court-martial, such delivery, if followed by conviction, shall be held to interrupt the execution of the sentence of the court-martial, and the offender shall be returned to military custody, after having answered to the civil authorities for his offense, for the completion of the said court-martial sentence.

E. WAR OFFENSES.

ART. 75. MISBEHAVIOR BEFORE THE ENEMY.—Any officer or soldier who, before the enemy, misbehaves himself, runs away, or shamefully abandons or delivers up or by any misconduct, disobedience, or neglect endangers the safety of any fort, post, camp, guard, or other command which it is his duty to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, or by any means whatsoever occasions false alarms in camp, garrison, or quarters, shall suffer death or such other punishment as a court-martial may direct.

The words preceding the word "fort" in art. 75, Code of 1916, were as follows: "Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons or delivers up any"; otherwise the same.

ART. 76. SUBORDINATES COMPELLING COMMANDER TO SURRENDER.—Any person subject to military law who compels or attempts to compel any commander of any garrison, fort, post, camp, guard, or other command, to give it up to the enemy or to abandon it shall be punishable with death or such other punishment as a court-martial may direct.

Art. 76, Code of 1916, read as follows:

"ART. 76. SUBORDINATES COMPELLING COMMANDER TO SURRENDER.—If any commander of any garrison, fort, post, camp, guard, or other command is compelled, by the officers or soldiers under his command, to give it up to the enemy or to abandon it, the officers or soldiers so offending shall suffer death or such other punishment as a court-martial may direct."

ART. 77. IMPROPER USE OF COUNTERSIGN.—Any person subject to military law who makes known the parole or countersign to any person not entitled to receive it according to the rules and discipline of war, or gives a parole or countersign different from that which he received, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct.

ART. 78. FORCING A SAFEGUARD.—Any person subject to military law who, in time of war, forces a safeguard shall suffer death or such other punishment as a court-martial may direct.

ART. 79. CAPTURED PROPERTY TO BE SECURED FOR PUBLIC SERVICE.—All public property taken from the enemy is the property of the United States and shall be secured for the service of the United States, and any person subject to military law who neglects to secure such property or is guilty of wrongful appropriation thereof shall be punished as a court-martial may direct.

ART. 80. DEALING IN CAPTURED OR ABANDONED PROPERTY.—Any person subject to military law who buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or to any other person directly or indirectly connected with himself, or who fails whenever such property comes into his possession or custody or within his control to give notice thereof to the proper authority and to turn over such property to the proper authority without delay, shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial, military commission, or other military tribunal may adjudge, or by any or all of said penalties.

ART. 81. RELIEVING, CORRESPONDENCE WITH, OR AIDING THE ENEMY.—Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or military commission may direct.

ART. 82. SPIES.—Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifi-

cations, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.

F. MISCELLANEOUS CRIMES AND OFFENSES.

ART. 83. MILITARY PROPERTY—WILLFUL OR NEGLIGENT LOSS, DAMAGE, OR WRONGFUL DISPOSITION.—Any person subject to military law who willfully, or through neglect, suffers to be lost, spoiled, damaged, or wrongfully disposed of, any military property belonging to the United States shall make good the loss or damage and suffer such punishment as a court-martial may direct.

ART 84. WASTE OR UNLAWFUL DISPOSITION OF MILITARY PROPERTY ISSUED TO SOLDIERS.—Any soldier who sells or wrongfully disposes of or willfully or through neglect injures or loses any horse, arms, ammunition, accouterments, equipment, clothing, or other property issued for use in the military service, shall be punished as a court-martial may direct.

ART. 85. DRUNK ON DUTY.—Any officer who is found drunk on duty shall, if the offense be committed in time of war, be dismissed from the service and suffer such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall be punished as a court-martial may direct. Any person subject to military law, except an officer, who is found drunk on duty shall be punished as a court-martial may direct.

ART. 86. MISBEHAVIOR OF SENTINEL.—Any sentinel who is found drunk or sleeping upon his post, or who leaves it before he is regularly relieved, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall suffer any punishment, except death, that a court-martial may direct.

ART. 87. PERSONAL INTEREST IN SALE OF PROVISIONS.—Any officer commanding in any garrison, fort, barracks, camp, or other place where troops of the United States may be serv-

ing who, for his private advantage, lays any duty or imposition upon or is interested in the sale of any victuals or other necessaries of life brought into such garrison, fort, barracks, camp, or other place for the use of the troops, shall be dismissed from the service and suffer such other punishment as a court-martial may direct.

ART. 88. INTIMIDATION OF PERSONS BRINGING PROVISIONS.—Any person subject to military law who abuses, intimidates, does violence to, or wrongfully interferes with any person bringing provisions, supplies, or other necessaries to the camp, garrison, or quarters of the forces of the United States shall suffer such punishment as a court-martial may direct.

ART. 89. GOOD ORDER TO BE MAINTAINED AND WRONGS REDRESSED.—All persons subject to military law are to behave themselves orderly in quarters, garrison, camp, and on the march; and any person subject to military law who commits any waste or spoil, or willfully destroys any property whatsoever (unless by order of his commanding officer), or commits any kind of depredation or riot, shall be punished as a court-martial may direct. Any commanding officer who, upon complaint made to him, refuses or omits to see reparation made to the party injured, in so far as the offender's pay shall go toward such reparation, as provided for in article 105, shall be dismissed from the service, or otherwise punished, as a court-martial may direct.

ART. 90. PROVOKING SPEECHES OR GESTURES.—No person subject to military law shall use any reproachful or provoking speeches or gestures to another; and any person subject to military law who offends against the provisions of this article shall be punished as a court-martial may direct.

ART. 91. DUELING.—Any person subject to military law who fights or promotes or is concerned in or connives at fighting a duel, or who, having knowledge of a challenge sent or about to be sent, fails to report the fact promptly to the proper authority, shall, if an officer, be dismissed from the service or suffer such other punishment as a court-martial may direct; and if any other person subject to military law, shall suffer such punishment as a court-martial may direct.

ART. 92. MURDER—RAPE.—Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

ART. 93. VARIOUS CRIMES.—Any person subject to military law who commits manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, embezzlement, perjury, forgery, sodomy, assault with intent to commit any felony, assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing, or assault with intent to do bodily harm, shall be punished as a court-martial may direct.

ART. 94. FRAUDS AGAINST THE GOVERNMENT.—Any person subject to military law who makes or causes to be made any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures, or advises the making or use of, any writing or other paper knowing the same to contain any false or fraudulent statements; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes or procures, or advises the making of, any oath to any fact or to any writing or other paper knowing such oath to be false; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures, or advises the forging or counter-

feiting of any signature upon any writing or other paper, or uses, or procures, or advises the use of any such signature, knowing the same to be forged or counterfeited; or

Who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the military service thereof, makes or delivers to any person such writing, without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States; or

Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States furnished or intended for the military service thereof; or

Who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, or other person who is a part of or employed in said forces or service, any ordnance, arms, equipment, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same;

Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of said penalties. And if any person, being guilty of any of the offenses aforesaid while in the military service of the United States, receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed. And if any officer, being guilty, while in the military service of the

United States, of embezzlement of ration savings, post exchange, company, or other like funds, or of embezzlement of money or other property intrusted to his charge by an enlisted man or men, receives his discharge, or is dismissed, or is dropped from the rolls, he shall continue to be liable to be arrested and held for trial and sentence by a court martial in the same manner and to the same extent as if he had not been so discharged, dismissed, or dropped from the rolls.

ART. 95. CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN.—Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.

ART. 96. GENERAL ARTICLE.—Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

IV. COURTS OF INQUIRY.

ART. 97. WHEN AND BY WHOM ORDERED.—A court of inquiry to examine into the nature of any transaction of or accusation or imputation against any officer or soldier may be ordered by the President or by any commanding officer; but a court of inquiry shall not be ordered by any commanding officer except upon the request of the officer or soldier whose conduct is to be inquired into.

ART. 98. COMPOSITION.—A court of injuiry shall consist of three or more officers. For each court of inquiry the authority appointing the court shall appoint a recorder.

ART. 99. CHALLENGES.—Members of a court of inquiry may be challenged by the party whose conduct is to be inquired into, but only for cause stated to the court. The court shall determine the relevancy and validity of any challenge, and shall not receive a challenge to more than one member at

a time. The party whose conduct is being inquired into shall have the right to be represented before the court by counsel of his own selection, if such counsel be reasonably available.

ART. 100. OATH OF MEMBERS AND RECORDERS.—The recorder of a court of inquiry shall administer to the members the following oath: "You, A. B., do swear (or affirm) that you will well and truly examine and inquire, according to the evidence, into the matter now before you without partiality, favor, affection, prejudice, or hope of reward. So help you God." After which the president of the court shall administer to the recorder the following oath: "You, A. B., do swear (or affirm) that you will, according to your best abilities, accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing. So help you God."

In case of affirmation the closing sentence of adjuration will be omitted.

ART. 101. POWERS; PROCEDURE.—A court inquiry and the recorder thereof shall have the same power to summon and examine witnesses as is given to courts-martial and the trial judge advocate thereof. Such witnesses shall take the same oath or affirmation that is taken by witnesses before courts-martial. A reporter or an interpreter for a court of inquiry shall, before entering upon his duties, take the oath or affirmation required of a reporter or an interpreter for a court-martial. The party whose conduct is being inquired into or his counsel, if any, shall be permitted to examine and cross-examine witnesses so as fully to investigate the circumstances in question.

ART. 102. OPINION ON MERITS OF CASE.—A court of inquiry shall not give an opinion on the merits of the case inquired into unless specially ordered to do so.

ART. 103. RECORD OF PROCEEDINGS—HOW AUTHENTICATED.—Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signature of the president and the recorder thereof, and be forwarded to the convening authority. In case the record can not be authenticated by the recorder, by reason of his death, disability, or

absence, it shall be signed by the president and by one other member of the court.

V. MISCELLANEOUS PROVISIONS.

ART. 104. DISCIPLINARY POWERS OF COMMANDING OFFICERS.—Under such regulations as the President may prescribe, the commanding officer of any detachment, company, or higher command may, for minor offenses, impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial.

The disciplinary punishments authorized by this article may include admonition, reprimand, withholding of privileges for not exceeding one week, extra fatigue for not exceeding one week, restriction to certain specified limits for not exceeding one week, and hard labor without confinement for not exceeding one week, but shall not include forfeiture of pay or confinement under guard; except that in time of war or grave public emergency a commanding officer of the grade of brigadier general or of higher grade may, under the provisions of this article also impose upon an officer of his command below the grade of a major a forfeiture of not more than one-half of such officer's monthly pay for one month. A person punished under authority of this article, who deems his punishment unjust or disproportionate to the offense, may, through the proper channel, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate or remit any unexecuted portion of the punishment. The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a crime or offense growing out of the same act or omission; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when

so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

This article omits matter which appeared in the first paragraph of art. 104, Code of 1916, as follows: After the words "President may prescribe," the words "and which he may from time to time revoke, alter, or add to," and after the words "minor offenses" the words "not denied by the accused." The first sentence of the second paragraph of the former article read as follows:

"The disciplinary punishments authorized by this article may include admonition, reprimand, withholding of privileges, extra fatigue, and restriction to certain specified limits, but shall not include forfeiture of pay or confinement under guard.

ART. 105. INJURIES TO PROPERTY—REDRESS OF.—Whenever complaint is made to any commanding officer that damage has been done to the property of any person or that his property has been wrongfully taken by persons subject to military law, such complaint shall be investigated by a board consisting of any number of officers from one to three, which board shall be convened by the commanding officer and shall have, for the purpose of such investigation, power to summon witnesses and examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by such board shall be subject to the approval of the commanding officer, and in the amount approved by him shall be stopped against the pay of the offenders. And the order of such commanding officer directing stoppages herein authorized shall be conclusive on any disbursing officer for the payment by him to the injured parties of the stoppages so ordered.

Where the offenders can not be ascertained, but the organization or detachment to which they belong is known, stoppages to the amount of damages inflicted may be made and assessed in such proportion as may be deemed just upon the individual members thereof who are shown to have been present with such organization or detachment at the time the damages complained of were inflicted as determined by the approved findings of the board.

The words "person of" appeared in the title of the former article, preceding the word "property."

ART. 106. ARREST OF DESERTERS BY CIVIL OFFICIALS.—It shall be lawful for any civil officer having authority under the laws of the United States, or of any State, Territory, District,

or possession of the United States, to arrest offenders, summarily to arrest a deserter from the military service of the United States and deliver him into the custody of the military authorities of the United States.

ART. 107. SOLDIERS TO MAKE GOOD TIME LOST.—Every soldier who in an existing or subsequent enlistment deserts the service of the United States or without proper authority absents himself from his organization, station, or duty for more than one day, or who is confined for more than one day under sentence, or while awaiting trial and disposition of his case, if the trial results in conviction, or through the intemperate use of drugs or alcoholic liquor, or through disease or injury the result of his own misconduct, renders himself unable for more than one day to perform duty, shall be liable to serve, after his return to a full-duty status, for such period as shall, with the time he may have served prior to such desertion, unauthorized absence, confinement, or inability to perform duty, amount to the full term of that part of his enlistment period which he is required to serve with his organization before being furloughed to the Army reserve.

ART. 108. SOLDIERS—SEPARATION FROM THE SERVICE.—No enlisted man, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, signed by a field officer of the regiment or other organization to which the enlisted man belongs or by the commanding officer when no such field officer is present; and no enlisted man shall be discharged from said service before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial.

ART. 109. OATH OF ENLISTMENT.—At the time of his enlistment every soldier shall take the following oath or affirmation: "I,———, do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the Rules and Arti-

cles of War." This oath or affirmation may be taken before any officer.

ART. 110. CERTAIN ARTICLES TO BE READ AND EXPLAINED.—Articles 1, 2, and 29, 54 to 96, inclusive, and 104 to 109, inclusive, shall be read and explained to every soldier at the time of his enlistment or muster in, or within six days thereafter, and shall be read and explained once every six months to the soldiers of every garrison, regiment, or company in the service of the United States.

ART. 111. COPY OF RECORD OF TRIAL.—Every person tried by a general court-martial shall, on demand therefor, made by himself or by any person in his behalf, be entitled to a copy of the record of the trial.

ART. 112. EFFECTS OF DECEASED PERSONS—DISPOSITION OF.—In case of the death of any person subject to military law the commanding officer of the place of command will permit the legal representative or widow of the deceased, if present, to take possession of all his effects then in camp or quarters; and if no legal representative or widow be present, the commanding officer shall direct a summary court to secure all such effects, and said summary court shall have authority to collect and receive any debts due decedent's estate by local debtors and to pay the undisputed local creditors of decedent in so far as any money belonging to the deceased which may come into said summary court's possession under this article will permit, taking receipts therefor for file with said court's final report upon its transactions to the War Department; *and as soon as practicable after the collection of such effects said summary court shall transmit such effects and any money collected, through the Quartermaster Department, at Government expense, to the widow or legal representative of the deceased, if such be found by said court, or to the son, daughter, father, provided the father has not abandoned the support of his family, mother, brother, sister, or the next of kin in the order named, if such be found by said court, or the beneficiary named in the will of the deceased, if such be found by said court, and said court shall thereupon make to the War Department a full report of its transactions; but if there be none of the persons hereinabove named, or such persons or*

their addresses are not known to or readily ascertainable by said court, and the said court shall so find, said summary court shall have authority to convert into cash, by public or private sale, not earlier than thirty days after the death of the deceased, all effects of deceased except sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valued chiefly as keepsakes; and as soon as practicable after converting such effects into cash said summary court shall deposit with the proper officer, to be designated in regulations, any cash belonging to decedent's estate, and shall transmit a receipt for such deposits, any will or other papers of value belonging to the deceased, *any sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes, together with* an inventory of the effects secured by said summary court, and a full account of its transactions, to the War Department for transmission to the Auditor for the War Department for action as authorized by law in the settlement of accounts of deceased officers and enlisted men of the Army.

The provisions of this article shall be applicable to inmates of the United States Soldiers' Home who die in any United States military hospital outside of the District of Columbia where sent from the home for treatment.

ART. 113. INQUESTS.—When at any post, fort, camp, or other place garrisoned by the military forces of the United States and under the exclusive jurisdiction of the United States, any person shall have been found dead under circumstances which appear to require investigation, the commanding officer will designate and direct a summary court-martial to investigate the circumstances attending the death; and, for this purpose, such summary court-martial shall have power to summon witnesses and examine them upon oath or affirmation. He shall promptly transmit to the post or other commander a report of his investigation and of his findings as to the cause of the death.

ART. 114. AUTHORITY TO ADMINISTER OATHS.—Any judge advocate or acting judge advocate, the president of a general or special court-martial, any summary court-martial, the trial judge advocate or any assistant trial judge advocate

of a general or special court-martial, the president or the recorder of a court of inquiry or of a military board, any officer designated to take a deposition, any officer detailed to conduct an investigation, and the adjutant of any command shall have power to administer oaths for the purposes of the administration of military justice and for other purposes of military administration; and in foreign places where the Army may be serving shall have the general powers of a notary public or of a consul of the United States in the administration of oaths, the execution and acknowledgment of legal instruments, the attestation of documents, and all other forms of notarial acts to be executed by persons subject to military law.

ART. 115. APPOINTMENT OF REPORTERS AND INTERPRETERS.—Under such regulations as the Secretary of War may from time to time prescribe, the president of a court-martial or military commission or a court of inquiry shall have power to appoint a reporter, who shall record the proceedings of and testimony taken before such court or commission and may set down the same, in the first instance, in shorthand. Under like regulations the president of a court-martial or military commission, or court of inquiry, or a summary court, may appoint an interpreter, who shall interpret for the court or commission.

ART. 116. POWERS OF ASSISTANT TRIAL JUDGE ADVOCATE AND OF ASSISTANT DEFENSE COUNSEL.—An assistant trial judge advocate of a general court-martial shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon the trial judge advocate of the court. **An assistant defense counsel shall be competent likewise to perform any duty devolved by law, regulation, or the custom of the service upon counsel for the accused.**

ART. 117. REMOVAL OF CIVIL SUITS.—When any civil or criminal prosecution is commenced in any court of a State against any officer, soldier, or other person in the military service of the United States on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting the military forces thereof, or under the law of war, such suit or prosecution may at any time before the

trial or final hearing thereof be removed for trial into the district court of the United States in the district where the same is pending in the manner prescribed in section 33 of the Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, and the cause shall thereupon be entered on the docket of said district court and shall proceed therein as if the cause had been originally commenced in said district court and the same proceedings had been taken in such suit or prosecution in said district court as shall have been had therein in said State court prior to its removal, and said district court shall have full power to hear and determine said cause.

ART. 118.—OFFICERS, SEPARATION FROM SERVICE.—No officer shall be discharged or dismissed from the service except by order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court-martial or in mitigation thereof; but the President may at any time drop from the rolls of the Army any officer who has been absent from duty three months without leave or who has been absent in confinement in a prison or penitentiary for three months after final conviction by a court of competent jurisdiction.

ART. 119. RANK AND PRECEDENCE AMONG REGULARS, MILITIA, AND VOLUNTEERS.—That in time of war or public danger, when two or more officers of the same grade are on duty in the same field, department, or command, or of organizations thereof, the President may assign the command of the forces of such field, department, or command, or of any organization thereof, without regard to seniority of rank in the same grade.

Same as first sentence of art. 119, Code of 1916. The omitted portion read as follows:

"In the absence of such assignment by the President, officers of the same grade shall rank and have precedence in the following order, without regard to date of rank or commission as between officers of different classes, namely: First, officers of the Regular Army and officers of the Marine Corps detached for service with the Army by order of the President; second, officers of forces drafted or called into service of the United States; and, third, officers of the volunteer forces: *Provided*, That officers of the Regular Army holding commissions in forces drafted or called into the service of the United States or in the volunteer forces shall rank and have precedence under said commissions as if they were commissions in the Regular Army; the rank of officers of the Regular Army under commissions in the National Guard as such shall not, for the purposes of this article, be held to antedate the acceptance of such officers into the service of the United States under said commissions."

ART. 120. COMMAND WHEN DIFFERENT CORPS OR COMMANDS HAPPEN TO JOIN.—When different corps or commands of the military forces of the United States happen to join or do duty together, the officer highest in rank of the line of the Regular Army, Marine Corps, forces drafted or called into the service of the United States, or Volunteers, there on duty, shall, subject to the provisions of the last preceding article, command the whole and give orders for what is needful in the service, unless otherwise directed by the President.

ART. 121.—COMPLAINTS OF WRONGS.—Any officer or soldier who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redress, may complain to the general commanding in the locality where the officer against whom the complaint is made is stationed. The general shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department of War a true statement of such complaint, with the proceedings had thereon.

Sec. 2. That the provisions of Chapter II of this Act shall take effect and be in force eight months after the approval of this Act: *Provided*, That articles 2, 23, and 45 shall take effect immediately.

Sec. 3. That all offenses committed and all penalties, forfeitures, fines, or liabilities incurred prior to the taking effect of Chapter II of this Act, under any law embraced in or modified, changed, or repealed by Chapter II of this Act, may be prosecuted, punished, and enforced in the same manner and with the same effect as if this Act had not been passed.

Sec. 4. That section 1342 of the Revised Statutes of the United States be, and the same is hereby, repealed, and all laws and parts of laws in so far as they are inconsistent with this Act are hereby repealed.

R. S. 1342 contained the former Articles of War.

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APPENDIX 2.

SYSTEM OF COURTS-MARTIAL FOR NATIONAL GUARD NOT IN THE SERVICE OF THE UNITED STATES.

SEC. 102. Except in organizations in the service of the United States, courts-martial in the National Guard shall be of three kinds, namely, general courts-martial, special courts-martial, and summary courts-martial. They shall be constituted like, and have cognizance of the same subjects, and possess like powers, except as to punishments, as similar courts provided for by the laws and regulations governing the Army of the United States, and the proceedings of courts-martial of the National Guard shall follow the forms and modes of procedure prescribed for said similar courts.

SEC. 103. General courts-martial of the National Guard not in the service of the United States may be convened by orders of the President, or of the governors of the respective States and Territories, or by the commanding general of the National Guard of the District of Columbia, and such courts shall have the power to impose fines not exceeding $200; to sentence to forfeiture of pay and allowances; to a reprimand; to dismissal or dishonorable discharge from the service; to reduction of noncommissioned officers to the ranks; or any two or more of such punishments may be combined in the sentences imposed by such courts.

SEC. 104. In the National Guard not in the service of the United States the commanding officer of each garrison, fort, post, camp, or other place, brigade, regiment, detached battalion, or other detached command, may appoint special courts-martial for his command; but such special courts-martial may in any case be appointed by superior authority when by the latter deemed desirable. Special courts-martial shall have power to try any person subject to military law, except a commissioned officer, for any crime or offense made punishable by the military laws of the United States, and such special courts-martial shall have the same powers of punishment as do general courts-martial, except that fines imposed by such courts shall not exceed $100.

SEC. 105. In the National Guard, not in the service of the United States, the commanding officer of each garrison, fort, post, or other place, regiment or corps, detached battalion, company, or other detachment of the National Guard may appoint for such place or command a summary court to consist of one officer, who shall have power to administer oaths and to try the enlisted men of such place or command for breaches of discipline and violations of laws governing such

organizations; and said court, when satisfied of the guilt of such soldier, may impose fines not exceeding $25 for any single offense; may sentence noncommissioned officers to reduction to the ranks; may sentence to forfeiture of pay and allowances. The proceedings of such court shall be informal, and the minutes thereof shall be the same as prescribed for summary courts of the Army of the United States.

SEC. 106. All courts-martial of the National Guard, not in the service of the United States, including summary courts, shall have power to sentence to confinement in lieu of fines authorized to be imposed: *Provided*, That such sentences of confinement shall not exceed one day for each dollar of fine authorized.

SEC. 107. No sentence of dismissal from the service or dishonorable discharge, imposed by a National Guard court-martial, not in the service of the United States, shall be executed until approved by the governor of the State or Territory concerned, or by the commanding general of the National Guard of the District of Columbia.

SEC. 108. In the National Guard, not in the service of the United States, presidents of courts-martial and summary court officers shall have power to issue warrants to arrest accused persons and to bring them before the court for trial whenever such persons shall have disobeyed an order in writing from the convening authority to appear before such court, a copy of the charge or charges having been delivered to the accused with such order, and to issue subpœnas and subpœnas duces tecum and to enforce by attachment attendance of witnesses and the production of books and papers, and to sentence for a refusal to be sworn or to answer as provided in actions before civil courts.

All processes and sentences of said courts shall be executed by such civil officers as may be prescribed by the laws of the several States and Territories, and in any State where no provision shall have been made for such action, and in the Territories and the District of Columbia, such processes and sentences shall be executed by a United States marshal or his duly appointed deputy, and it shall be the duty of any United States marshal to execute all such processes and sentences and make return thereof to the officer issuing or imposing the same. (Act of June 3, 1916, 39 Stat., 208, 209.)

21358°—20——36

APPENDIX 3.

FORM OF ORDER APPOINTING A GENERAL COURT-MARTIAL.

Headquarters ——— (Corps Area) (Division) (Department).
(Place) ——— (Date) ——— 19—

SPECIAL ORDERS, }
No. ——— }

A general court-martial is appointed to meet at ———, ———, at ——— ———, on ——— 19—, or as soon thereafter as practicable, for the trial of such persons as may be properly brought before it.

DETAIL FOR THE COURT.

Col. ———, 5th Cavalry.
Lieut. Col. ———, 1st Infantry.
Lieut. Col. ———, 3d Field Artillery.
Maj. ———, J. A. G. D., law member.
Maj. ———, 3d Field Artillery.
Capt. ———, 4th Infantry.
Capt. ———, 5th Cavalry.
Capt. ———, 1st Infantry.
Capt. ———, 3d Field Artillery.
Capt. ———, 5th Cavalry, trial judge advocate.
First Lieut. ———, 3d Field Artillery, assistant trial judge advocate.
Capt. ———, 4th Infantry, defense counsel.
First Lieut. ———, 4th Infantry, assistant defense counsel.

(In case travel is necessary, the following sentence will be added:)

The travel directed in compliance with this order is necessary in the military service.

By command of Maj. Gen. ——— ———.

——— ——— (name),
——— ——— (rank) (General Staff),
Chief of Staff.

Official:

——— ———,
Adjutant.

NOTE.—A succession of orders modifying an order appointing a court-martial is liable to result in serious errors. When practicable it should be avoided by appointing a new court.

APPENDIX 4.

FORM OF ORDER APPOINTING A SPECIAL COURT-MARTIAL.

{SPECIAL ORDERS, No. ——. Headquarters ———— ———, (Place) ——— (Date) ——— 19—

A special court-martial is appointed to meet at ———, ——— at ——— ———, ———, 19——, or as soon thereafter as practicable, for the trial of such persons as may be properly brought before it.

DETAIL FOR THE COURT.

Maj. ———, 1st Cavalry.
Capt. ———, 3d Cavalry.
Capt. ———, 4th Coast Artillery Company.
First Lieut. ———, 3d Cavalry.
First Lieut. ———, 1st Infantry.
Capt. ———, 4th Coast Artillery Company, trial judge advocate.
Capt. ———, 3d Cavalry, defense counsel.

(In case the appointing authority desires that the testimony be reduced to writing, the following sentence will be added:)

The testimony will be reduced to writing, and the president is authorized to employ a reporter.

By order of Colonel ———:

——— ———,
Adjutant.

APPENDIX 5.

Form No. 594, A. G. O.
December 8, 1920.

CHARGE SHEET.

(See Instructions on page 4.)

No. ———————
(In summary court record.)

———————, ———————, 19—.
(Place.) (Date.)

———————, ———————, ———————, ———————
(Surname of accused.) (Christian name.) (Army serial No.) (Grade.)

———————
(Company and regiment, or corps, or department.)

Date of current enlistment, ———————, 19—; age at enlistment, ——— years ——— months.

Term of current enlistment ——— years.

Rate of pay, $——— Class A allotment, $——— per month. Class B allotment, $——— per month.

Allotment for insurance premium, $——— per month.

Prior service, ———————
(Give dates, with character given on each discharge.)

Witnesses, both for and against the accused, so far as known, are as follows (see Instruction 4):

Against the accused— To be found at—

For the accused— To be found at—

Memorandum of documentary evidence bearing on the case (see Instructions 4 and 9):

List of documents.	Original appended.	Copy appended.	If original is not appended, state place where it may be found.

Is accused now in arrest?——— or in confinement?———
If so, date of arrest ———, 19—, or confinement ———, 19—
If so, place where accused is now in arrest or confinement ———

CHARGE SHEET.

CHARGE: Violation of the ———— Article of War.
Specification:

(Signature of accuser)————————————————

————————————————
(Grade and organization and arm, or staff corps, or department.)

(*Additional sheets, if necessary, for charges and specifications will be attached here. Ordinary 8 by 12 inch paper will be used for additional sheets.*)

AFFIDAVIT.

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this ———— day of ————, 19—, and made oath that he is a person subject to military law and that he personally signed the foregoing charges and specifications, and further that he * has personal knowledge of the matters set forth in specifications ————————————————; and * has
(Indicate by specification and charge numbers.)
investigated the matters set forth in specifications ————————
(Indicate
————————————————, and that the same are true
by specification and charge numbers.)
in fact, to the best of his knowledge and belief.

(Name)————————————————
(Rank and organization.)

————————————————
(Official character, as summary court, notary public, etc.)

NOTES.—(1) At (*) strike out words not applicable.
(2) If the accuser has personal knowledge of the facts stated in one or more specifications or parts thereof, and his knowledge as to other specifications or parts thereof is derived from investigation of the facts, the form of the oath will be varied accordingly. In no case will he be permitted to state alternatively, as to any particular charge or specification, that he either has personal knowledge or has investigated. (See note to par. 75, M. C. M.)
(3) If the oath is administered by a civil officer having a seal, his official seal should be affixed.

1ST IND.
(See Instruction 6.)

Headquarters ————, ————————, ————, 19—.
(Place.) (Date.)

Referred for trial to ————————————————
(Rank, name, and organization. Summary court, trial
———————————— court-martial appointed by paragraph ——— Special Orders, No. ———
judge advocate.) (Summary, special, or general.)
Headquarters ————————————————, 19—.

By ———— of ————————————————
(Command or order.) (Rank and name of commanding officer.)
————————————————, *Adjutant.*

I have served copies hereof and of accompanying papers, in accordance with the requirements of paragraph 77*b*, Manual for Courts-Martial, on the above-named accused, this ——— day of ———, 19—

(Name)———————, *Trial Judge Advocate.*
(Rank and organization.)

Pleas: ———————

Findings: ———————

Sentence: ———————

Days in arrest (or confiement), ———————; maximum punishment, ———————

Remarks:

NOTE.—The foregoing blank spaces will be filled in by summary courts. In other cases they will not be filled in by trial judge advocates or others at the trial, but will be reserved for use for record purposes at the headquarters of the officer appointing the special or general court-martial.

Entered on pay card (forfeiture only). (See Instruction 8)———————
(Initials of adjutant.)

Entered on service record in cases of conviction (see Instruction 8)———————

———————
(Initials of company or detachment commander.)

INSTRUCTIONS.

1. Before preparing charges on this form the provisions of the seventieth article of war and of paragraph 75, Manual for Courts-Martial, and the note thereunder, together with paragraphs 62, 63, 64, 65, 66, and 67, Manual for Courts-Martial, and of the particular article or articles of war alleged to have been violated, and the paragraphs of the Manual for Courts-Martial relating thereto, will be carefully considered.

2. Charges for trial by courts-martial may be preferred by any person subject to military law. All charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of or has investigated the matters set forth therein, and that the same are true in fact to the best of his knowledge and belief. (A. W. 70.)

Charges will be preferred only when the person preferring them either has personal knowledge of or has investigated the matters set forth therein, and from such knowledge or investigation is of the opinion that there is reasonable ground for believing that the offense has been committed, that the accused is guilty of the offense, and that the offense can not be properly or adequately dealt with in any other manner. (Par. 75, M. C. M.)

3. All charges for trial by courts-martial will be in triplicate and may be prepared by carbon process. This charge sheet form will be used for each of the three copies, and all copies will be signed by the accuser and the officer administering the oath. Should the space on this form be insufficient to accommodate all the charges and specifications proposed, such additional sheets of ordinary paper will be used for that purpose as may be required. The charges and specifications will be signed as indicated on this prescribed form and the affidavit thereto, in substantially the form hereon prescribed, will be sworn to before any officer, civil or military, authorized to administer oaths in cases of this character (see as to the competency of military officers to administer oaths, par. 138, M. C. M.), and will be forwarded to the commanding officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains.

4. All known witnesses, both for and against the accused, will be listed in the prescribed place on this charge sheet, mentioning where they may be found; and all documents bearing upon the case which may be obtainable will be listed in the prescribed place under "Memorandum of documentary evidence bearing on the case" above. Wherever available, original documents which may be useful as evidence will be appended and securely fastened hereto. If the originals are not available, copies will, if available, be so appended. In any case where the originals are not so appended (whether or not copies are appended), the place where the originals may be found will be noted in the appropriate place under "Memorandum of documentary evidence bearing on the case" above.

5. The affidavit to the charges must state positively either that (1) the affiant preferring the charges has personal knowledge of the matters set forth therein, or else, (2) that he has investigated them and has thus satisfied himself of the facts. It must clearly appear upon which ground he places his statement of the truth of the facts alleged in the charges and specifications. He is not to be permitted to say alternatively, as to any particular charge or specification, that he either has personal knowledge or has investigated. Such an indefinite statement is wholly insufficient to satisfy the requirements of the seventieth article of war, and will not be accepted.

He may, however, base some of the allegations in a specification, or some of the specifications, on his personal knowledge, and others upon his investigation of the facts. In such cases he will, in the affidavit, state which are based upon personal knowledge and which upon investigation. (See note to par. 75, M. C. M.)

6. If trial is ordered, the order of reference for trial will be indorsed on one original counterpart hereof, as "1st Ind.," in the form hereon prescribed.

The counterpart on which such order is indorsed will be the one retained by the trial judge advocate during trial and returned by him

with the record of trial to the convening authority. (See par. 79*b*, M. C. M.)

7. The trial judge advocate will also enter on this same counterpart, in substantially the form hereon prescribed, his certificate of service of the charges and accompanying documents on the accused, as required by paragraph 77*b*, M. C. M.

8. The initials of the adjutant indicating entry on pay card when forfeiture is awarded, and the initials of the company or detachment commander indicating entry on service record in case of conviction, will be placed on the original charge sheet of summary courts-martial, completed as the record of trial.

9. Bulky reports or official documents will not ordinarily be appended or copied, but listed, and the place where they may be found stated in the column so headed, on page 1.[1]

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[1] "Page 1" of A. G. O. Form 594, is page 560 supra.

APPENDIX 6.

FORMS FOR CHARGES AND SPECIFICATIONS.

INSTRUCTIONS.

The forms for charges and specifications set forth below constitute a general guide for use in the drafting of charges and specifications under the several articles of war, not only for offenses specifically provided for in the forms but also for like offenses not specifically mentioned therein. In preparing charges the following general rules should be observed:

(*a*) When there is more than one charge the charges will be numbered, using the Roman numerals, viz, I, II, etc.

(*b*) When there is more than one specification under a charge the specifications under that charge will be numbered, using the Arabic numerals, viz, 1, 2, etc.

(*c*) The form provided for the charge will not in any case be abbreviated, added to, or deviated from.

(*d*) The several forms provided for specifications will be added to or deviated from when circumstances require such addition or deviation.

(*e*) The words inclosed in parentheses or brackets, or both, in the forms for specifications may or may not be used, as circumstances require.

(*f*) The blanks inclosed in parentheses in the forms for specifications, indicate that a proper substitute may be used.

(*g*) The name of the accused as stated in the specification should, except in a case in which the jurisdiction of the court over the person is not dependent upon his being a person subject to military law (*e. g.*, see A. W. 81 and 82), be accompanied by such descriptive language as will show that he is a person subject to military law and therefore subject to the jurisdiction of the court. Thus, in the ordinary case of an officer or soldier in the service, the specification should read "In that Captain John Smith, Field Artillery, did," etc., or "In that Private John Smith, Company A, 7th Infantry, did," etc. These forms are applicable for all persons in the military service whether members of the Regular Army or volunteer forces accepted or mustered into the military service of the United States or members of the National Guard or of other forces which may have been drafted, called or ordered into, or to duty or for training in, the military service of the United States, provided the accused has actually answered such call, draft or order; if, however, the accused has not obeyed the call, draft, or order, his name should be followed

by the words "lawfully called (drafted) *or* (ordered) into the military service of the United States." If the accused has not been assigned to an organization, the word "unassigned" may be employed. In the case of a cadet, the specification should read "In that Cadet John Smith, United States Military Academy, did," etc. In the case of a member of the Marine Corps detached for service with the Armies of the United States by order of the President, the words "detached for service with the Armies of the United States by order of the President" should follow the other words of identification and description. When the accused is an officer or enlisted man of the Medical Department of the Navy, serving with a body of Marines detached for service with the Armies of the United States by order of the President, this fact should be alleged as follows: "In that ———, Medical Department of the Navy, serving with a body of Marines detached for service with the Armies of the United States by order of the President, did," etc. As to the persons subjected to military jurisdiction by paragraph (*d*) of Article of War 2, the words "a retainer to the camp of United States troops without the territorial jurisdiction of the United States," or " a person accompanying the Armies of the United States without the territorial jurisdiction of the United States," or "a person serving with the Armies of the United States without the territorial jurisdiction of the United States," should be employed, unless it be *in time of war*, when the words "a retainer to the camp of United States troops in the field," or "a person accompanying the Armies of the United States in the field," or "a person serving with the Armies of the United States in the field," should be used, according to the circumstances of each case. As to the persons designated in paragraph (*e*) of Article of War 2, the name of the accused should be followed by the words "a person under sentence adjudged by court-martial."

(*h*) The place and date of the commission of the alleged offense will ordinarily be stated in the body of the specification and not in a separate line at the end thereof.

(*i*) The words "officer preferring charge," or words of similar import, will not be used in connection with the signature of the person who subscribes the charges.

SPECIMEN CHARGES.

[To be placed on charge sheet, Appendix 5.]

CHARGE I: Violation of the 54th Article of War.

Specification: In that Pvt. Richard Roe, Company A, Second Infantry, alias Pvt. John Doe, Company F, Twenty-ninth Infantry, did, without a discharge from said Company A, Second Infantry, procure himself to be enlisted in the military service of the United States at Fort Jay, N. Y., on the 24th day of July, 1917, under the name of John Doe, by willfully concealing from Capt. William White, Medical

Corps, a recruiting officer, the fact of his prior enlistment in said Company A, Second Infantry, and has at Fort Jay, N. Y., since said date, received allowances under said enlistment.

CHARGE II: Violation of the 58th Article of War.

Specification: In that Pvt. Richard Roe, Company A, Second Infantry, alias Pvt. John Doe, Company F, Twenty-ninth Infantry, did, at Fort Jay, N. Y., on or about the 6th day of March, 1917, desert the service of the United States, and did remain absent in desertion until he was apprehended at Fort Jay, N. Y., on or about July 24, 1917.

CHARGE III: Violation of the 96th Article of War.

Specification 1: In that Pvt. Richard Roe, Company A, Second Infantry, alias Pvt. John Doe, Company F, Twenty-ninth Infantry, did, at Fort Jay, N. Y., on or about March 6, 1917, wrongfully strike in the face with his fist Pvt. John W. Davis, Third Company, Fort Hamilton, then a sentinel in the execution of his duty.

Specification 2: In that Pvt. Richard Roe, Company A, Second Infantry, alias Pvt. John Doe, Company F, Twenty-ninth Infantry, having at Fort Jay, N. Y., on or about the 6th day of March, 1917, received a lawful order to halt from Pvt. John W. Davis, Third Company, Fort Hamilton, then a sentinel in the execution of his duty, did willfully disobey the same.

JOHN JONES,
Captain, C. A. C.

FORMS.

[See instructions at the beginning of this appendix.]

CHARGE: Violation of the 54th Article of War.

1. *Specification:* In that Pvt. ———, Company ———, ——— Infantry, *alias* Pvt. ———, Company ———, ——— Infantry, did, without a discharge from said ——— Infantry, procure himself to be enlisted in the military service of the United States at ———, on the ——— day of ———, 19—, under the name of ———, (by means of willfully misrepresenting to ———, a recruiting officer that he had never been enlisted in the service of the United States and) by means of willfully concealing from (said) (———, a) recruiting officer, the fact of his prior enlistment in said ——— Infantry; and has, at ——— and since said date, received (pay) (allowances) (pay and allowances) under said enlistment.

2. *Specification:* In that ——— did procure himself to be enlisted in the military service of the United States, at ———, on the ——— day of ———, 19—, [by means of willfully misrepresenting to ———, a recruiting officer, that he had never been discharged from the service of the United States (on account of disability) (on account

of a sentence imposed by a civil court) (pursuant to the sentence of a general court-martial) (except with good character) and] by means of willfully concealing from (said) (———, a) recruiting officer the fact that (under the name of ———) he had been discharged at ——— on the ——— day of ———, 19—, from ——— (on account of disability) (on account of a sentence imposed by a civil court) (pursuant to the sentence of a general court-martial) (not with good character) when, except for such (misrepresentattion) (concealment) he would not have been enlisted; and has, at ——— and since said enlistment received (pay) (allowances) (pay and allowances) thereunder.

3. *Specification:* In that ——— did procure himself to be enlisted in the military service of the United States, at ———, on the ——— day of ———, 19—, [by means of willfully misrepresenting to ———, a recruiting officer, that he had never been (convicted of a felony) (imprisoned) in a (reformatory) (jail) (penitentiary) and] by means of willfully concealing from (said) (———, a) recruiting officer, the fact that (under the name of ———) (he had been convicted of a felony, to wit, ——— by the ——— court in and for ———,) (had been imprisoned in a (reformatory) (jail) (penitentiary) under a sentence of a civil court) when, except for such (misrepresentation) (concealment) he would not have been enlisted; and has, at ——— and since said enlistment received (pay) (allowances) (pay and allowances) thereunder.

4. *Specification:* In that ——— did procure himself to be enlisted in the military service of the United States at ———, on the ——— day of ———, 19—, [by means of willfully misrepresenting to ———, a recruiting officer, that he was (——— years of age) (unmarried) (———) and] by means of willfully concealing from (said) (———, a) recruiting officer, the fact that he was then (under the age of eighteen years) (a married man) (———), when, except for such (misrepresentation) (concealment) he would not have been enlisted; and has, at ——— and since said enlistment, received (pay) (allowances) (pay and allowances) thereunder.

CHARGE: Violation of the 55th Article of War.

5. *Specification:* In that ——— did at ———, on the ——— day of ———, 19—, knowingly (enlist) (muster) into the military service of the United States one ———, who, as he, the said ———, then well knew, was (an) (insane) (intoxicated) (———) (a) person (who had been convicted of a felony) (under the age of sixteen (16) years) (———), whose (enlistment) (muster) was prohibited by (law) (regulations) (orders).

CHARGE: Violation of the 56th Article of War.

6. *Specification:* In that ———, did, at ———, on the ——— day of ———, 19—, knowingly make a false muster of (———) as

(present) (———) when the said ———, as he, the said ———, then well knew, was not (present) (———), but was (absent with leave) (———).

7. *Specification:* In that ——— did, at ———, on the ——— day of ———, 19—, knowingly make a false muster of (———) as a soldier and a member of (———), when the said ———, as he, the said ——— then well knew, was not a soldier and a member of said (———) but was a (civilian) (———).

8. *Specification:* In that ——— did, at ———, on the ——— day of ———, 19—, (sign) (direct ——— to sign) (allow ——— to sign) the muster roll of ———, for the period ——— to ———, 19—, he, the said ———, then well knowing that the said muster roll contained the name of ——— as (a soldier and a member of said ———) (an officer of said ———) (and as present for duty therewith), and that the said ——— was not (a soldier) (a member of said ———) (an officer of said ———) (present for duty) but was then (a civilian) (a member of company ———) (wholly absent from military duty) (———).

9. *Specification:* In that ——— did, at ———, on the ——— day of ———, 19—, (sign) (direct ——— to sign) (allow ——— to sign) the muster roll of ———, for the period ——— to ———, 19—, he the said ———, then well knowing that the said muster roll contained a false statement that ——— (a) (private) (———) of said ———) was (present) (present and mustered) (———), and that said statement was false, in that the said ——— was not (present) (present and mustered) (———) but was then (absent with leave) (absent without leave) (———).

10. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, wrongfully take from ——— (the sum of $———) (———), as a consideration to him ———, for knowingly permitting the muster-in roll of ——— ——— on the mustering in of that ——— falsely to show as (mustered in) (———), ———, who, as he, the said ———, then well knew, was (were) not (mustered in) (———).

11. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, wrongfully take from ——— the sum of $———, (———) as a consideration to him ———, for allowing the muster roll of ———, for the period of ——— to ———, 19—, to show ——— as (present and mustered) (———), when, as he, the said ———, then well knew, he (they) was (were) not present and mustered as shown on said muster roll.

12. *Specification:* In that ——— did, at ———, on the ——— day of ———, 19—, knowingly muster one ——— as (an officer) (a soldier) of ———, when the said ———, as he, the said ———, then well knew was not (an officer) (a soldier) of ———, but was then a (civilian) (———).

CHARGE: Violation of the 57th Article of War.

13. *Specification:* In that ———, being in command of ———, and it being his duty to render to ——— a return of the state of (the troops under his command) (the ——— thereunto belonging) for the period ——— to ———, 19—, did, at ——— on the ——— day of ———, 19—, knowingly make a false return for said period, which return was false in that it showed (one ——— as absent with leave) (———), when as he, the said ———, then well knew (the said ——— was absent without leave) (———).

14. *Specification:* In that ———, being in command of ———, and it being his duty to render to the ——— a return of the state of (the troops under his command) (the ——— thereto belonging) for the period ——— to ———, did (on and after the ——— day of ———, 19—) (from ——— until ———), through (neglect) (design), omit to render such return.

CHARGE: Violation of the 58th Article of War.

15. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, desert the service of the United States, and did remain absent in desertion until he (was apprehended) (surrendered himself) at ——— on or about the ——— day of ———, 19—.

16. *Specification:* In that ——— did, at ——— on or about the ——— day of ———, 19—, in the (execution of a conspiracy to desert the service of the United States previously entered into with ——— and ———) (presence of ———, which the forces, of which the accused was a member, were then opposing), desert the service of the United States and did remain absent in desertion until he (was apprehended) (surrendered himself) at ——— on or about the ——— day of ———, 19—.

17. *Specification:* In that ——— and ——— did, at ———, on or about the ——— day of ———, 19—, acting jointly, in pursuance of a common intent and in the execution of a conspiracy to desert the service of the United States previously entered into by them (and in the presence of ———, which the forces, of which they were members, were then opposing), desert the service of the United States and did remain absent in desertion until they (were apprehended) (surrendered themselves) at ——— on or about the ——— day of ———, 19—.

18. *Specification:* In that ——— did, at ———, on or about the ———day of ———, 19—, desert the service of the United States, in that he, having tendered his resignation as an officer of the Army, did, prior to due notice of the acceptance of said resignation, and with the intent to absent himself permanently therefrom, quit his (post) (proper duties) without leave.

[NOTE.—See A. W. 28.]

19. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, desert the service of the United States, in that he, without having first received a regular discharge from the

military service, did, again enlist in the (Army) (militia, in the service of the United States) (Navy) (Marine Corps of the United States) (Army of ———).

[NOTE.—See A. W. 28.]

20. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, desert the service of the United States, by quitting his (organization) (place of duty), with the intent (to avoid hazardous duty, to wit: ———) (to shirk important service, to wit: ———).

[NOTE.—See A. W. 28.]

21. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, attempt to desert the service of the United States by (seeking passage to ——— on the steamship ———) (———), with intent permanently to remain away from the military service.

22. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, in the (execution of a conspiracy to desert the service of the United States previously entered into with ——— and ———) (presence of ———, which the forces of which he was a member were then opposing) attempt to desert the service of the United States by (seeking passage to ——— on the steamship ———) (———), with intent permanently to remain away from the military service.

CHARGE: Violation of the 59th Article of War.

23. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, (advise) (persuade) ——— to desert the service of the United States by (saying to him ——— ——— ——— ——— ———, or words to that effect) (———).

24. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, knowingly assist ——— to desert the service of the United States (by supplying him with a railroad ticket from ——— to ———) (———), he, the said ———, then well knowing that the said ——— intended to use the (railroad ticket) (———) so supplied him in furtherance of his plan to desert.

CHARGE: Violation of the 60th Article of War.

25. *Specification:* In that ———, having discovered that ———, a soldier in his command, was a deserter from the (military service) (naval service) (Marine Corps) did, at ———, from about the ——— day of ———, to about the ——— day of ———, 19—, retain said deserter in his command without informing superior authority or the commander of the organization to which the deserter belonged of the presence of said deserter in his command.

CHARGE: Violation of the 61st Article of War.

26. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, fail to repair at the fixed time to the properly appointed place (of assembly) for ———.

27. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, without proper leave, go from the properly appointed place (of assembly) for ———, after having repaired thereto for the performance of said duty.

28. *Specification:* In that ———, did at ———, without proper leave, absent himself from his ——— from about ———, 19—, to about ———, 19—.

CHARGE: Violation of the 62d Article of War.

29. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, use (orally and publicly) (———) the following (contemptuous) (disrespectful) (contemptuous and disrespectful) words against the (President) (Vice President) (the Congress of the United States) (Secretary of War) [(Governor) (Legislature) of the (State of ———) (Territory of ———) (———, a possession of the United States), in which he, the said ——— was then quartered] to wit: ——— ——— ———, or words to that effect.

CHARGE: Violation of the 63d Article of War.

30. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, behave himself with disrespect toward ———, his superior officer, by (saying to him ————————, or words to that effect) (contemptuously turning from and leaving him while he was talking to him the said ———) (———).

CHARGE: Violation of the 64th Article of War.

31. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, strike ———, his superior officer, who was then in the execution of his office, (in) (on) the ——— with (a) (his) ———.

[NOTE.—For assaults upon officers amounting to felonies see A. W. 93.]

32. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, (draw) (lift up) a weapon, to wit, a ——— against ———, his superior officer, who was then in the execution of his office.

33. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, offer violence against ———, his superior officer, who was then in the execution of his office, in that he, the said ———, did ———.

34. *Specification:* In that ———, having received a lawful command from ———, his superior officer, to ———, did at ———, on or about the ——— day of ———, 19—, willfully disobey the same.

CHARGE: Violation of the 65th Article of War.

35. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, (strike) (assault) ———, a (warrant officer) (noncommissioned officer) who was then in the execu-

tion of his office, by ——— him (in) (on) the ——— with (a) (his) ———.

[NOTE.—For assaults upon warrant and noncommissioned officers amounting to felonies see A. W. 93.]

36. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, (attempt) (threaten) to (strike) (assault) ———, a (warrant officer) (noncommissioned officer) [(in) (on) the ———] with (a) (his) ———, while said ——— was in the execution of his office.

37. *Specification:* In that ———, having received a lawful order from ———, a (warrant officer) (noncommissioned officer) who was then in the execution of his office, to ———, did at ———, on or about the ——— day of ———, 19—, willfully disobey the same.

38. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, [use (threatening) (insulting) (threatening and insulting) language,] [behave in an (insubordinate) (disrespectful) (insubordinate and direspectful) manner] toward ———, a (warrant officer) (noncommissioned officer) who was then in the execution of his office, by (saying to him ———, or words to that effect) (———).

CHARGE: Violation of the 66th Article of War.

39. *Specification:* In that ——— did, at ———, on the ——— day of ———, 19—, (attempt to create) (begin) (excite) (cause) a mutiny in ——— by [urging the members of said ——— concertedly to refuse to obey the lawful orders of ———, their (commanding) (superior) officer, to ———] [unlawfully assuming control over about ——— soldiers of said (command) (———), and in the execution of such control causing said soldiers concertedly to disregard and defy the lawful orders of ———, their (commanding) (superior) officer to (assemble for drill) (———),] [———], with the intent to (usurp) (subvert) (override) (neutralize) (usurp, subvert, override and neutralize), for the time being, lawful military authority.

40. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, voluntarily join in a mutiny which had been begun in ——— against the lawful military authority of ———, the commanding officer thereof, and did, with intent to (usurp) (subvert) (override) (neutralize) (usurp, subvert, override, and neutralize) for the time being, in concert with sundry other members of said ——— assembled on the (parade ground) (———), refuse to (disperse) (do any further duty) (assemble for drill) (———).

CHARGE: Violation of the 67th Article of War.

41. *Specification:* In that ———, being present at a (mutiny) (sedition) among the soldiers of ———, did fail to use his utmost endeavor to suppress the same, in that, (having commanded the

men of his own company to return to their quarters, he took no means to compel their obedience or reduce them to discipline upon their refusal to obey said command) (———).

42. *Specification:* In that ———, being at ——— and (knowing) (having reason to believe) on the ——— day of ———, 19—, that a (mutiny) (sedition) was to take place in ———, on or about the ——— day of ———, 19—, did fail to give without delay information of said intended mutiny to his commanding officer.

CHARGE: Violation of the 68th Article of War.

43. *Specification:* In that ———, being engaged in a (quarrel) (fray) (disorder) among persons subject to military law, and having been ordered into (arrest) (confinement) by ———, did, at ———, on or about the ——— day of ———, 19—, [(refuse to obey) (draw a weapon, to wit a ——— upon) the said ———] [threaten the said ——— by (saying to him (her) ———, or words to that effect) (———)] [do violence to the said ———, by ———].

CHARGE: Violation of the 69th Article of War.

44. *Specification:* In that ———, having been lawfully placed in (arrest at ———) (confinement in ———) on or about the ——— day of ———, 19—, did at ——— on or about the ——— day of ———, 19—, (break his said arrest) (escape from said confinement) before he was set at liberty by proper authority.

CHARGE: Violation of the 70th Article of War.

45. *Specification:* In that ———, being then charged with the duty of investigating charges preferred against ———, a person subject to military law, who had been placed in (arrest) (confinement), was at ———, on or about ———, 19—, responsible for unnecessary delay in investigating said charges, in that he (did ———) (failed to ———).

CHARGE: Violation of the 71st Article of War.

46. *Specification:* In that ———, being on duty as (provost marshal) (commander of the guard) at ——— on or about the ——— day of ———, 19—, did refuse to (receive) (keep) one ———, a prisoner duly committed to his charge by ———, an officer belonging to the forces of the United States who, at the time of committing said prisoner, delivered to the said ——— an account in writing, signed by himself, of the (crime) (offense) charged against said prisoner.

CHARGE: Violation of the 72d Article of War.

47. *Specification:* In that ———, (having been) (being) on duty as commander of the guard at ———, did, on or about the ——— day of ———, 19—, fail to report in writing to the commanding officer

of that ——— (as soon as relieved from his guard) (within 24 hours after the confinement of said prisoner) the name of ———, a prisoner committed to his charge, the offense charged against him, and the name of the officer committing him.

CHARGE: Violation of the 73d Article of War.

48. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, [without proper authority release] [through (neglect) (design) (suffer)] ———, a prisoner duly committed to his charge (to escape).

CHARGE: Violation of the 74th Article of War.

49. *Specification:* In that ———, being at the time the commanding officer at ———, and an application having been duly made to him by the ——— of ——— for the (delivery) (apprehension and securing) of ———, a (soldier) (officer) under his command, who was accused of a (crime) (offense) committed against the laws of ———, in order that the said ——— might be brought to trial did, at ———, on the ——— day of ———, 19—, (refuse) (willfully neglect) to (deliver said ——— to said ——— of ———) (aid the said ——— of ——— in apprehending and securing the said ———).

CHARGE: Violation of the 75th Article of War.

50. *Specification:* In that ——— did, at ———, on the ——— day of ———, 19—, misbehave himself before the enemy, (by (refusing) (failing) to advance with his command, which had then been ordered forward by ——— to engage with ———, which forces, the said command was then opposing) (———).

51. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, run away from his (company) (———), which was then engaged with the enemy, and did not return thereto until (after the engagement had been concluded) (———).

52. *Specification:* In that ———, being present with his ——— while it was engaged with the enemy, did at ———, on or about the ——— day of ———, 19—, shamefully abandon the said ——— and (seek safety in the rear) (———), and did fail to rejoin it until (the engagement was concluded) (———).

53. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, while before the enemy shamefully (deliver up) (abandon) to the enemy ———, which it was his duty to defend.

54. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, while before the enemy, by his (misconduct) (disobedience) (neglect) endanger the safety of ———, which it was his duty to defend, in that he (———) (———) (failed and neglected to post a sufficient number of sentinels).

55. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, while before the enemy, speak words in-

ducing [(the officers) (the soldiers) (the officers and soldiers) of ———] [———] (to misbehave themselves before the enemy) (to run away from ———, which was then before the enemy) (shamefully to abandon their command, which was then engaged with the enemy) (shamefully, to deliver up to the enemy, ———, which it was their duty to defend), to wit ——— or words to that effect.

56. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, while before the enemy speak words inducing ——— who was then on outpost duty, (shamefully to abandon his post) (———), to wit ——— or words to that effect.

57. *Specification:* In that ———, while before the enemy, did at ———, on the ——— day of ———, 19—, unlawfully cast away his (rifle) (ammunition) (———).

58. *Specification:* In that ——— did, while before the enemy, quit his (post) (colors) at ———, on the ——— day of ———, 19—, for the purpose of (plundering) (pillaging) (plundering and pillaging) (———).

59. *Specification:* In that ——— did, while on duty before the enemy, occasion a false alarm in the (camp) (garrison) (quarters) (———) at ———, on or about the ——— day of ———, 19—, by (needlessly and without authority causing the call to arms to be sounded) (———).

CHARGE: Violation of the 76th Article of War.

60. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, (compel) (attempt to compel) ———, the commanding officer of ———, (to give it up to the enemy) (to abandon said ———), by ———.

CHARGE: Violation of the 77th Article of War.

61. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, make known the (parole) (countersign), to wit, ———, to ———, a person who, according to the rules and discipline of war, was not entitled to receive it.

62. *Specification:* In that ———, having received as the proper (parole) (countersign) the word ———, did at———, on or about the ——— day of ———, 19—, give to ———, a person to whom he knew it was his duty to give the proper (parole) (countersign), a (parole) (countersign) different from that which he had received, to wit ———.

CHARGE: Violation of the 78th Article of War.

63. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, force a safeguard, known by him to have been placed over the premises occupied by ———, at ———, by (overwhelming the guard posted for the protection of the same) (———).

CHARGE: Violation of the 79th Article of War.

64. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, neglect to secure the following public property of the United States, which had been taken from the enemy, viz, ——— of the value of about $——— and ——— of the value of about $———, and all of the total value of about $———.

65. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, wrongfully appropriate to (his own use) (———) the following public property of the United States, taken from the enemy, viz: ——— of the value of about $——— and ——— of the value of about $———, and all of the total value of about $———.

CHARGE: Violation of the 80th Article of War.

66. *Specification:* In that ——— did, at ———, on about the ——— day of ———, 19—, unlawfully (buy) (sell) (trade in) (deal in) (dispose of) the following (captured) (abandoned) property of the United States, namely: ——— of the value of about $——— and ——— of the value of about $———, and all of the total value of about $———, thereby (receiving) (expecting) as (profit) (benefit) (advantage) (profit, benefit and advantage) to (himself) ———, his (brother) (———), (the sum of ———) (——— of the value ———).

67. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, fail to give notice of and to turn over without delay to proper authority the following (captured) (abandoned) property of the United States, which had come into his (possession) (custody) (control), namely: ——— of the value of about $——— and ——— of the value of about $———, and all of the total value of about $———.

CHARGE: Violation of the 81st Article of War.

68. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, (relieve) (attempt to relieve) the enemy with (arms) (ammunition) (supplies) (money) (———), by furnishing and delivering to certain members of the enemy's army ———, of the value of about $———, and ———, of the value of about $———, all of the total value of $———.

69. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, knowingly (harbor) (protect) (harbor and protect) ———, a person whom he, the said ———, then knew to be a member of the enemy's forces (and who was then being sought by a patrol of the United States forces), by (concealing the said member of the enemy's forces in his house) (———).

70. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, knowingly give intelligence to the enemy, (by informing a patrol of the enemy's forces of the whereabouts of a military patrol of the United States forces) (by ———).

71. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, knowingly (hold correspondence with) (give intelligence to) (hold correspondence with and give intelligence to) the enemy (directly by writing and transmitting secretly through the lines to one ———, whom he, the said ———, then knew to be an (officer) (———) of the enemy's army, a communication (in words and figures as follows) (substantially as follows) (indirectly by publishing in ———, a newspaper published at ———, a communication in words and figures as follows) (substantially as follows), to wit: ———, and which communication was intended to reach the enemy.

CHARGE: Violation of the 82d Article of War.

72. *Specification:* In that ——— was, at ———, on or about the ——— day of ———, 19—, found (lurking) (acting) (lurking and acting) as a spy in and about ———, the (fortification) (post) (quarters) (encampment) of the Armies of the United States there situated, (———) for the purpose of (collecting) (attempting to collect) material information in regard to the (numbers) (resources) (operations) (———) of the military forces of the United States, with intent to impart the same to the enemy.

CHARGE: Violation of the 83d Article of War.

73. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, (willfully) (through neglect) suffer ———, of the value of $———, military property belonging to the United States, to be (lost) (spoiled by ———) (damaged by ———) [wrongfully disposed of by (sale to ———) (———)].

CHARGE: Violation of the 84th Article of War.

74. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, (unlawfully sell to ———) (wrongfully dispose of by ———) ——— of the value of $———, issued for use in the military service of the United States.

75. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, (willfully) (through neglect) (injure by ———) (lose) ———, of the value of $———, issued for use in the military service of the United States.

CHARGE: Violation of the 85th Article of War.

76. *Specification:* In that ——— was, at ———, on or about the ——— day of ———, 19—, found drunk while on duty as ———.

CHARGE: Violation of the 86th Article of War.

77. *Specification:* In that ———, being on guard and posted as a sentinel, at ———, on or about the ——— day of ———, 19—, was found (drunk) (sleeping) upon his post.

78. *Specification:* In that ———, being on guard and posted as a sentinel, at ———, on or about the ——— day of ———, 19—, did leave his post before he was regularly relieved.

CHARGE: Violation of the 87th Article of War.

79. *Specification:* In that ———, who was then commanding in ———, where troops of the United States were serving, did, on or about the ——— day of ———, 19—, for his private advantage, lay a (duty) (imposition) (duty and imposition) of (——— per cent) (———) upon the sales of (victuals) (certain necessaries of life, to wit, ———) brought into said ———, for the use of the troops thereat.

80. *Specification:* In that ———, who was then commanding ———, where troops of the United States were serving, did on or about the ——— day of ———, 19—, for his private advantage, become interested in the sale of (victuals) (certain necessaries of life, to wit ———) (———), brought into said ——— for the use of the troops thereat by ———, by (receiving) (entering into an agreement to receive) from the said ——— (— per cent of the profits on said sales) (the sum of $—) as a consideration for the privilege (of ———) extended by him to said ———.

CHARGE: Violation of the 88th Article of War.

81. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, unlawfully (abuse) (intimidate) (do violence to) (and wrongfully interfere with) ———, a person bringing (provisions) (supplies) (certain necessaries) to wit ———, to the (camp) (garrison) (quarters) of the forces of the United States at ——— by [striking and beating the said ———] [threatening to kill the said ——— if he continued to bring such (provisions) (supplies) (necessaries) into said (camp) (garrison) (quarters)] [———] [preventing the said ——— from passing over a road leading into said ———] [———].

CHARGE: Violation of the 89th Article of War.

82. *Specification:* In that ———, being with ———, (in the (quarters) (garrison) (camp) at ———) (while on the march from ——— to ———) did, at ———, on or about the ——— day of ———, 19—, commit (waste) (spoil) upon the property of ———, by ———.

83. *Specification:* In that ———, being with ———, (in the (quarters) (garrison) (camp) at ———) (while on the march from ——— to ———) did, at ———, on or about the ——— day of ———, 19—, willfully and unlawfully, and without having been ordered by his commanding officer so to do, destroy ——— the property of ———, of the value of ———.

84. *Specification:* In that ———, being with ———, (in the (quarters) (garrison) (camp) at ———) (while on the march from ——— to ———) did, at ———, on or about the ——— day of ———, 19—, commit a depredation upon (an) (a) (orchard) (———) belonging to ———, and situated at or near ———, by unlawfully (entering the same and removing growing fruit from the trees of said orchard) (———).

85. *Specification:* In that ———, ——— and ———, being with ——— (in the (quarters) (garrison) (camp) at ———) (while on the march from ——— to ———) did, at ———, on or about the ——— day of ———, 19—, commit a riot, in that they, together with certain other (soldiers) (persons) to the number of ———, whose names are unknown, did, (with force and arms) unlawfully and riotously, and in a violent and tumultuous manner, assemble to disturb the peace of ———, and having so assembled, did (unlawfully, riotously and in a violent and tumultuous manner disturb, enter and break up ———) (unlawfully and riotously assault ——— by ———,) to the terror and disturbance of ———.

86. *Specification:* In that ———, who was then the commanding officer of ———, at ———, did, on the ——— day of ———, 19—, complaint having been made to him that (damage had been done to ———, the property of ———) (———, the property of ———, had been taken by) (———, a ———) (——— ——— soldiers) of his command, (a) person(s) subject to military law, ———, (refuse) (omit) to see reparation made to the said ——— so far as said ———'s pay would go toward such reparation and as provided for in the 105th Article of War, by ———.

CHARGE: Violation of the 90th Article of War.

87. *Specification:* In that ——— did at ———, on or about the ——— day of ———, 19—, wrongfully use a (reproachful) (provoking) (reproachful and provoking) (speech to wit: ——— or words to that effect, against) (gesture to ———) (by shaking his closed fist in the face of the said ———) (———).

CHARGE: Violation of the 91st Article of War.

88. *Specification:* In that ——— (and ———) did at ———, on or about the ——— day of ———, 19—, fight a duel, (with ———) using, as weapons therefor, (swords) (pistols) (———).

89. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, promote a duel between ——— and ——— by knowingly acting as a messenger for ——— and knowingly carrying from said ——— to said ——— a challenge to fight a duel.

90. *Specification:* In that ———, being officer of the day at ——— and having knowledge that ——— and ——— intended and were about to engage in a duel near that ———, did on or about the ——— day of ———, 19—, connive at the fighting of said duel by knowingly permitting ———, one of the parties to said proposed duel, to leave the post and go toward the place appointed for said duel and at the time and at the hour which he, ———, then knew had been appointed therefor.

91. *Specification:* In that ———, being officer of the day at ———, and having knowledge on or about the ——— day of ———, 19—,

that a challenge to fight a duel (had been sent) (was about to be sent) by ——— to ———, did fail to report that fact promptly to the proper authority.

CHARGE: Violation of the 92d Article of War.

92. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one ———, a human being by (shooting him with a rifle) (———).

93. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, forcibly and feloniously, against her will, have carnal knowledge of ———.

[NOTE.—For charging the offense denounced by section 279, Federal Penal Code (having carnal knowledge of female under 16), see Form 178, infra.]

CHARGE: Violation of the 93d Article of War.

94. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, willfully, feloniously, and unlawfully kill ———, a human being by ——— him (in) (on) the ——— with a ———.

95. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, unlawfully, willfully, and feloniously cut off the (hand) (arm) (———) of ———.

[NOTE.—For the offense of maiming, see Form No. 170, infra.]

96. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, willfully, maliciously, unlawfully and feloniously [(set fire to) (burn) (attempt to burn)] [by means of a dangerous explosive, to wit ——— (destroy) (attempt to destroy)] the (dwelling house) (store) (barn) (stable) (a building, to wit: ———, parcel of the dwelling house) of ———.

97. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, in the nighttime feloniously and burglariously break and enter the (dwelling house) (——— within the curtilage) of ———, with intent to commit a felony, viz, (larceny) (rape) (murder) (———).

98. *Specification:* In that ——— did, at ———, on or about the ——— day of ——— 19—, unlawfully and feloniously (break and enter) (enter without breaking) the (dwelling) (bank) (store) (warehouse) (shop) (stable) (———) (apartment) (room) (steamboat) (canal boat) (vessel) (———) (railroad car) (yard, where (lumber) (coal) (———) was deposited and kept for the purpose of trade) with intent (to break and carry away a part thereof, to wit, ———) (to break and carry away a (fixture, thereof, to wit, ———) (———, a thing (attached to) (connected with said ———) (to commit a criminal offense, to wit, ———).

99. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, by force and violence and by putting him in fear feloniously take, steal and carry away from the (person) (presence) of ———, ———, the property of ———, value about $———.

[NOTE.—While under section 284 of the Federal Penal Code a specification in the following form (No. 99) is sufficient, it is generally preferable to follow Form No. 98, in order that the court may make a finding of guilty of the lesser included offense of larceny should only this offense be proved.]

100. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, by force and violence and by putting him in fear, feloniously take from the (person) (presence) of ———, ———, value about $———.

101. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, feloniously take, steal, and carry away ———, value about $———, the property of ———.

102. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, fraudulently convert to his own use and benefit ———, value about $———, the property of ———, intrusted to him (by the said ———) (for ——— by ———), for the purpose of applying the same to the use and benefit of the said ———, (the owner) (the person so delivering) said property.

103. *Specification:* In that ———, being at the time the (agent) (attorney) (clerk) (servant) (———, an officer) of (———) (an association) (an incorporated company) did [wrongfully convert to his own use] [fraudulently (take) (make way with) (secrete) with intent to convert the same to his own use] ———, of the value of ———, the property of ———, which came (into his possession) (under his care) by virtue of his (employment) (office).

104. *Specification:* In that ———, having taken an oath in a (trial by ——— court-martial of ———) (deposition for use in a trial by ——— court-martial of ———) (———), a case in which a law of the United States authorizes an oath to be administered, before ———, a competent (tribunal) (officer) (person) that [he would (testify) (declare) (depose) (certify) truly] [(certain written testimony) a (declaration) (deposition) (certificate) subscribed by him was true] did, at ———, on or about the ——— day of ———, 19—, willfully, corruptly, and contrary to such oath, (state) (subscribe said ———, stating) in substance that ———] which (statement) (declaration) (deposition) (certificate) was a material matter and which statement he did not believe to be true.

[NOTE.—For perjury under Section 25 of the War Risk Insurance Act, see Form No. 178.]

105. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, with intent to (defraud) (injure) (defraud and injure) falsely (make) [alter] (in its entirety) a certain (check) (———) in the following words and figures, to-wit: ———

[by ———] which said (check) (———) was a writing of a (public) (private) nature, which might operate to the prejudice of another.

106. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, with intent to (defraud) (prejudice the right of another) (defraud and prejudice the right of another) willfully, unlawfully and feloniously, (pass) (utter) (publish) [attempt to (pass) (utter) (publish)] as true and genuine a certain ——— in words and figures as follows: ———, a writing of a (public) (private) nature, which might operate to the prejudice of another, which said ——— was, as he, the said ——— then well knew, falsely (made) (altered) and forged.

107. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with (———) (a mare, the same being a beast) (———).

108. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, with intent to (commit a felony, viz, ———) (do him bodily harm), commit an assault upon ———, by willfully and feloniously (striking) (———) the said ——— (in) (on) the ——— with a ———.

109. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, with intent to do him bodily harm, commit an assault upon ———, by (shooting) (striking) (cutting) (———) him (in) (on) the ———, with a dangerous (weapon) (instrument) (thing) to wit, a (pistol) (a pickax) (bayonet) (———).

CHARGE: Violation of the 94th Article of War.

110. *Specification:* In that ——— did, at ———, on or about the ——— day of ——— 19—, (make) (cause to be made by ———) a claim against the [United States by presenting to ———,] [(Finance Officer at ———) (———)] an officer of the United States, duly authorized to (approve) (allow) (pay) (approve, allow and pay) such claims, in the amount of $——— for (private property alleged to have been (lost) (destroyed) in the military service) (———), which claim was (false) (fraudulent) (false and fraudulent) in that ———, and was then known by said ——— to be (false) (fraudulent) (false and fraudulent).

111. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, (present) (cause to be presented by ———) for (approval) (payment) (approval and payment) a claim against the [United States by (presenting) (causing to be presented) to ———,] [(Finance Officer at ———) (———) an officer of the United States, duly authorized to (approve) (pay) (approve and pay)] such claims, in the amount of $———, for (services alleged to have been rendered to the United States by ———) (———), which claim was (false) (fraudulent) (false and fraudulent) in that ———, and was then known by the said ——— to be (false) (fraudulent) (false and fraudulent).

112. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, enter into an (agreement) (conspiracy) (agreement and conspiracy) with ———, to defraud the United States by (obtaining) (aiding ——— to obtain) the (allowance) (payment) (allowance and payment) of a (false) (fraudulent) (false and fraudulent) claim against the United States in the amount of $———, for (supplies) (———) alleged to have been furnished to the United States by ———, which claim was (false) (fraudulent) (false and fraudulent) in that ———, and was then known by the said ——— to be (false) (fraudulent) (false and fraudulent).

113. *Specification:* In that ———, for the purpose of (obtaining) (aiding others, viz, ———, to obtain) the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the [United States, by presenting to ———] [(Finance Officer at ———) (———), an officer of the United States duly authorized to (approve) (pay) (allow) (approve, pay and allow) such claims] did, at ———, on or about the ——— day of ———, 19—, (make) (use) (make and use) [(procure) (advise) the (making) (use) (making and use) of] a certain (writing) (paper) to wit: ———, which said ———, as he, the said ———, then knew contained a statement that ———, which statement was (false) (fraudulent) (false and fraudulent) in that ———, and was then known by the said ——— to be (false) (fraudulent) (false and fraudulent).

114. *Specification:* In that ———, for the purpose of (obtaining) (aiding others, viz, ——— to obtain) the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the [United States by presenting to ———,] [(Finance Officer at ———) (———), an officer of the United States duly authorized to (approve) (allow) (pay) (approve, allow and pay) such claims] did, at ———, on or about the ——— day of ———, 19—, (make) [(procure) (advise) (advise and procure) the making of] an oath (by ———) to (the fact that ———) (to a certain (writing) (paper) to wit ———, to the effect that ———) which said oath was false in that ———, and was then known by the said ——— to be false.

115. *Specification:* In that ———, for the purpose of (obtaining) (aiding others, viz, ——— to obtain) the (approval) (allowance) (payment) (approval, allowance and payment) of a claim against the [United States by presenting to ———,] [(Finance Officer at ———) (———) an officer of the United States, duly authorized to (approve) (allow) (pay) (approve, allow and pay) such claims] did, at ———, on or about the ——— day of ———, 19—, (forge) (counterfeit) (forge and counterfeit) [(procure) (advise) (procure and advise) the (forging) (counterfeiting) (forging and counterfeiting) of] the signature of ——— upon a ———, (———) [by ———] in words and figures as follows: ———.

116. *Specification:* In that ———, for the purpose of (obtaining) (aiding others to obtain) the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the [United States by presenting to ———] [(Finance Officer at ———) (———), an officer of the United States, duly authorized to (approve) (allow) (pay) (approve, allow and pay) such claims] did, at ———, on or about the ——— day of ———, 19—, (use) (advise the use of) (procure the use of) the signature of ——— on a certain (writing) (paper) to wit, ——— such signature, being (forged) (counterfeited) (forged and counterfeited), and then known by the said ——— to be (forged) (counterfeited) (forged and counterfeited).

117. *Specification:* In that ———, having (charge) (possession) (custody) (control) of (money) (———) of the United States, (furnished) (intended) (furnished and intended) for the military service thereof, did, at ———, on or about the ——— day of ———, 19—, knowingly (deliver) (cause to be delivered) to ———, the said ———, having authority to receive the same, (an amount) which, as he, ———, then knew was (——— dollars ——— cents) (———) less than the (amount) for which he received a (certificate) (receipt), from the said ———.

118. *Specification:* In that ———, being authorized to (make) (deliver) (make and deliver) a paper certifying the receipt of property of the United States (furnished) (intended) (furnished and intended) for the military service thereof, did, at ———, on or about the ——— day of ———, 19—, (make) (deliver) (make and deliver) to ——— a writing in words and figures as follows: ———, without having full knowledge of the truth of the statements therein contained and with the intent to defraud the United States.

119. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, feloniously take, steal, and carry away ——— of the value of about $———, property of the United States (furnished) (intended) (furnished and intended) for the military service thereof.

120. *Specification:* In that ———, being at the time ———, did, on the ——— day of ———, 19—, feloniously embezzle by fraudulently converting to his own use and benefit, ——— of the value of ———, the property of the United States, (furnished) (intended) (furnished and intended) for the military service thereof, intrusted to him the said ——— by ——— for the purpose of applying the same to the use and benefit of the United States.

121. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, (knowingly and willfully misappropriate) (knowingly and willfully apply to his own use) (knowingly and willfully apply to his own benefit) (knowingly and willfully apply to his own use and benefit) [(wrongfuly) (knowingly and without proper authority) (wrongfully and knowingly) (sell) (dispose of by———)] ——— ——— of the value of about $———, property of the United

States (furnished) (intended) (furnished and intended) for the military service thereof.

122. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, knowingly (purchase) (receive in pledge for an (obligation) (indebtedness)) from ——— ———, (in) (employed in) the military (service) (forces) of the United States ———, of the value of about $———, property of the United States, the said ——— not having the lawful right to (sell) (pledge) the same.

CHARGE: Violation of the 95th Article of War.

123. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, [with intent to defraud] [with intent to (deceive) (injure) (deceive and injure)] wrongfully and unlawfully make and utter to ———, a certain check, in words and figures as follows, to wit: ———, [and by means thereof, did fraudulently obtain from ——— ($———) (——— of the value of about $———)] [in payment of ———], he, the said ———, then well knowing that he did not have and not intending that he should have (any account with) (sufficient funds in) the ——— Bank for the payment of said check.

124. *Specification:* In that ——— was, at ———, on or about the ——— day of ———, 19—, so (drunk) (disorderly) (drunk and disorderly) while in uniform, in the presence and hearing of several persons, as to disgrace the military service.

125. *Specification:* In that ———, having assigned to ——— his claim (against the United States) for pay in full for the month of ———, 19—, did, at ———, on or about the ——— day of ———, 19—, again assign to ——— said claim (or for the use of) against the United States for pay in full for the said month of ———, 19—, which second assignment was by him known to be false and fraudulent.

126. *Specification:* In that ———, being indebted to ——— in the sum of $——— for ———, which amount became due and payable (on) (about) (on or about) ———, did, at ———, from ———, 19—, to ———, 19—, without due cause, fail and neglect to pay said debt, notwithstanding the fact that he had been repeatedly requested by the said ——— to pay the amount thereof, thereby bringing discredit upon the military service.

127. *Specification:* In that ———, having on or about the ——— day of 19— become indebted to ——— in the sum of about $——— for ———, and having failed without due cause to liquidate said indebtedness, and having on or about the ——— day of ———, 19—, promised in writing to said ——— that he would on or about the ——— day of ———, 19—, (settle such indebtedness in full) (pay on such indebtedness the sum of $———), did, without due cause, at ———, on or about the ——— day of 19—, to the disgrace of the military service, fail to keep said promise.

128. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, with intent to deceive ———, officially (report) (state) to the said ———, that ———, which (report) (statement) was (known by the said ——— to be untrue) (believed by the said ——— to be untrue) (made by the said ——— with disregard of a knowledge of the facts) (made by the said ——— as true when he did not know it to be true) in that ———.

129. *Specification:* In that ———, with intent to defraud ———, did, at ———, on or about the ——— day of ———, 19—, unlawfully pretend to ——— that ———, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the said ——— (the sum of $———) (merchandise of the value of $———) (———).

130. *Specification:* In that ———, having at ———, on or about the ——— day of ———, 19—, voluntarily given his pledge in words and figures as follows: ———, which pledge was accepted by his commanding officer ———, did, at ———, on or about the ——— day of ———, 19—, in disregard of his honor violate said pledge by ———.

CHARGE: Violation of the 96th Article of War.

131. *Specification:* In that ———, being on guard as a ———, did, at ———, on or about the ——— day of ———, 19—, abandon his guard.

[NOTE.—This form will be used only in case where absence from guard is coupled with an intent not to return during the tour of duty. Ordinary absence from guard duty will be charged under A. W. 61.)

132. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, wrongfully [kick a public (horse) ——— in the belly] (———).

133. *Specification:* In that ———, a (sentinel) (overseer) (———), being in charge of prisoners, did, at ———, on or about the ——— day of ———, 19—, wrongfully allow ———, a prisoner under his charge, to (go to) (enter) (go to and enter) an unauthorized place, to wit: ———.

134. *Specification:* In that ———, a (sentinel) (overseer) (———), being in charge of prisoners, did, at ———, on or about the ——— day of ———, 19—, wrongfully allow ———, a prisoner under his charge, to (hold unauthorized conversation with ———) (loiter) (neglect his task by ———) (obtain ———) (———).

135. *Specification:* In that ———, a (sentinel) (overseer) (———), being in charge of prisoners and having received a lawful order from ———, to require a prisoner under his charge to ———, did, at ———, on or about the ——— day of ———, 19—, fail to obey the same.

136. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, without authority, appear in civilian clothing.

137. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, wrongfully appear (at) (on) ——— (without his ———) (with his ——— not buttoned) (in an unclean ———) (———).

138. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, wrongfully attempt to (strike) (———) ——— (in) (on) the ——— with ———.

[NOTE.—For assaults upon officers, warrant officers, and noncommissioned officers amounting to felonies see A. W. 93.]

139. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, commit an assault upon ——— by wrongfully (striking) (———) ——— (in) (on) the ——— with ———.

[NOTE.—See note under Specification 138.]

140. *Specification:* In that ——— did, at ——— (on or about the ——— day of ———, 19—), (between ——— and ———), with the intention of evading his (duty) (———) as a (soldier) (———), feign (illness), (disability), (insanity), (———).

141. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, unlawfully (attempt to) (threaten to) (strike) (———) ———, a sentinel in the execution of his duty, [(in) (on) the ———] with ———.

142. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, wrongfully strike (———) ———, a sentinel in the execution of his duty, (in) (on) the ——— with ———.

143. *Specification:* In that ———, a prisoner lawfully in confinement in the post guardhouse, (———), did, at ———, on or about the ——— day of ———, 19—, attempt to escape from such confinement.

144. *Specification:* In that ———, a prisoner, did, at ———, on or about the ——— day of ———, 19—, use the following disrespectful language to ———, a sentinel in the execution of his duty: "———," or words to that effect.

145. *Specification:* In that ———, having been restricted to the limits of ———, did, at ———, on or about the ——— day of ———, 19—, break said restriction by going to ———.

146. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, unlawfully carry a concealed weapon, viz, a ———.

147. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, wrongfully (urinate) (defecate) (———) (on the floor of the squad room) (———).

148. *Specification:* In that ——— did, at ———, or or about the ——— day of ———, 19—, willfully and unlawfully [(conceal) (remove) (mutilate) (obliterate) (destroy)] [attempt to (conceal) (remove) (mutilate) (obliterate) (destroy)] [take and carry away with intent to (conceal) (remove) (mutilate) (obliterate) (destroy) (steal)] a public record, to wit: (the descriptive list of ———) (———).

149. *Specification:* In that ———, a prisoner lawfully in confinement in the post guard house, (———), did at ———, on or about the ——— day of ———, 19—, conspire with ——— and ——— to escape from such confinement. (For joint charge see par. 69.)

150. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, willfully, wrongfully, and unlawfully destroy ———, value about $———, property of the United States.

151. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, through carelessness, discharge a (service rifle) (———) in his (squad room). (in his tent) (———).

152. *Specification:* In that ———, having received a lawful order from ———, a sentinel in the execution of his duty, to ———, did, at ———, on or about the ——— day of ———, 19—, (fail to obey) (willfully disobey) the same.

153. *Specification:* In that ——— was, at ———, on or about the ——— day of ———, 19—, (drunk) (disorderly) (drunk and disorderly) in (camp) (post) (quarters) (———).

154. *Specification:* In that ——— was, at ———, on or about the ——— day of ———, 19—, (drunk) (disorderly) (drunk and disorderly) in uniform and did thereby bring discredit upon the military service.

155. *Specification:* In that ———, a sentinel (———) in charge of prisoners, did, at ———, on or about the ——— day of ———, 19—, drink intoxicating liquor with ———, a prisoner under his charge.

156. *Specification:* In that ———, a prisoner, was, at ———, on or about the ——— day of ———, 19—, found drunk.

157. *Specification:* In that ———, having received a lawful order from ——— to ———, the said ——— being in the execution of his office, did, at ———, on or about the ——— day of ———, 19—, fail to obey the same.

158. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, violate (standing orders) (regulations) of ——— by ———.

159. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, wrongfully use ———, a narcotic drug.

160. *Specification:* In that ———, being indebted to ——— in the sum of $———, which amount became due and payable (on) (about) ———, did, at ———, on or about the ——— day of ———, 19—, without due cause, fail and neglect to pay said debt, notwithstanding the fact that he had been repeatedly requested by the said ——— to pay the amount thereof, thereby bringing discredit upon the military service.

161. *Specification:* In that ———, having been directed to report for prophylactic treatment at (the post hospital) (———) did, at ———, on or about the ——— day of ———, 19—, fail and neglect to report as directed.

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162. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, with intent to deceive ———, officially (report) (state) to the said ———, that ———, which (report) (statement) was (known by the said ——— to be untrue) (believed by the said ——— to be untrue) (made by the said ——— with disregard of a knowledge of the facts) (made by the said ——— as true when he did not know it to be true) in that ———.

163. *Specification:* In that (Sergeant) (Corporal) ——— did, at ———, on or about the ——— day of ———, 19—, gamble with Privates ——— and ———.

164. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, gamble in quarters, in violation of orders.

165. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, while (at a barrack window) (———) willfully and wrongfully expose in an indecent manner to public view his (———).

166. *Specification:* In that ——— (for and in behalf of one ———) did, at ———, on or about the ——— day of ———, 19—, loan to ——— $———, under an agreement whereby he, the said ———, was to receive for the use of said money for ——— (months) (days) interest at the rate of ——— per cent per (annum) (month) (the sum of $———), thereby (demanding) (receiving) (demanding and receiving) an usurious rate of interest for said loan.

167. *Specification:* In that ———, while posted as a sentinel, did, at ———, on or about the ——— day of ———, 19—, loiter on his post.

168. *Specification:* In that ———, with intent to defraud, did, at ———, on or about the ——— day of ———, 19—, unlawfully pretend to ——— that ———, well knowing that said pretenses were false and by means thereof did fraudulently obtain from the said ——— (the sum of $———) (merchandise of the value of $———) (———).

169. *Specification:* In that ———, while suffering (with) (from) ———, did, at ———, on or about the ——— day of ———, 19—, refuse to submit to the (dental *or* medical treatment) (surgical operation) prescribed by ———, the attending (dental) surgeon for the (disease) (injury), the said (treatment) (operation) consisting in ———, (said operation having been certified by the attending surgeon as) being necessary (for the removal of a disability that prevents the full performance of military duty) and without risk to his life (and the accused having been advised that such certificate had been made).

170. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, willfully maim himself in the ——— by (shooting himself with ———) (———), thereby unfitting himself for the full performance of military service.

171. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, with intent to (maim) (disfigure) (maim and disfigure), willfully, unlawfully, and feloniously [(cut) (bite)

(slit) the (nose) (ear) (lip)] [(cut out) (disable) the tongue] [(put out) (destroy) the eye] [(cut off) (disable) the (limb) (———, the member)] of ——— by ———.

172. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, with intent to (maim) (disfigure) (maim and disfigure), willfully, unlawfully, and feloniously, (throw) (pour) upon ———, (scalding hot water) (vitriol) ———, a corrosive acid) (——— a caustic substance).

173. *Specification:* In that ———, while posted as a sentinel, did, at ———, on or about the ——— day of ———, 19—, wrongfully sit down on his post.

174. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, while accompanying his organization on (a practice march) (maneuvers) without just cause straggle.

175. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, procure ——— to commit perjury, by inducing him, the said ———, to take an oath before a competent (tribunal) (officer) (person) in a (trial by court-martial of ———) (———), a case in which a law of the United States authorizes an oath to be administered that [he, the said ———, would (testify) (declare) (depose) (certify) truly] [(certain written testimony) a (declaration) (deposition) (certificate) subscribed by him was true] and, willfully, corruptly, and contrary to such oath, to (testify) (declare) (depose) (certify) as follows: ——— ———, which (testimony) (declaration, deposition, etc.) was false, was (material) (a material matter) and was known by the said ——— and the said ——— to be false.

176. *Specification:* In that ———, a prisoner on parole, did, at ———, on or about the ——— day of ———, 19—, break his parole by ———.

177. *Specification:* In that ——— did, at ———, on or about ——— feloniously receive, have, and conceal (describe property as in larceny), of the goods and chattels of (name owner), then lately before feloniously stolen, taken, and carried away; he, the said (accused), then well knowing the said goods and chattels to have been so feloniously stolen, taken, and carried away.

178. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, in a claim for (family allowance) (compensation) (insurance) [in ———, a document required by (regulations made under) the War Risk Insurance Act, in the making of a claim for (family allowance) (compensation) (insurance), to wit ———] willfully and unlawfully make a statement that ——— which statement was a material fact, and known by the said ——— to be false, in that ———.

179. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, carnally and unlawfully know ——— a female under the age of sixteen years.

APPENDIX 7.

FORMS FOR SYNOPSES OF CONVICTIONS BY COURT-MARTIAL.

(For Entry in Service Record.)

INSTRUCTIONS.

The forms for recording the synopses of convictions by court-martial as set forth below constitute *a general guide for use in entering convictions on the service record*, the synopsis of the record being entered in the following sequence in each case:

(*a*) Article of War; (*b*) synopsis of specification; (*c*) date of commission of offense.

(See forms for synopses of sentences, Appendix 14.)

[The figures "/18," at the end of each form, indicate the place to fill in the year. Thus, e. g., for 1921, write "/21."]

FORMS.

These forms cover the charges and specifications given in Appendix 6.

CHARGE: 54 AW.

1. Fraud. enl. while already in service, ——— /18.
2. Fraud. enl. after (dishonorable discharge) (conviction of felony) (———), ——— /18.
3. Fraud. enl. after imprisonment in (jail) (reformatory) (penitentiary), ——— /18.
4. Fraud. enl. while (under 18) (married) (———), ——— /18.

CHARGE: 55 AW.

5. Omitted; refer to officers only.

CHARGE: 56 AW.

6 to 12, inclusive, omitted; refer to officers only.

CHARGE: 57 AW.

13 and 14 omitted; refer to officers only.

CHARGE: 58 AW.

15. Attempting to desert, ——— /18.
16. In the (execution of a conspiracy with ———) (presence of the enemy) attempting to desert, ——— /18.
17. Desertion from ——— until (apprehended) (he surrendered himself) on ———, ——— /18.
18. In the (execution of a conspiracy with ———) (presence of the enemy) desertion from ——— until (apprehended) (he surrendered himself) on ———, ——— /18.

19. Jointly with others in the execution of a conspiracy (and in the presence of the enemy) deserted from ——— until they (were apprehended) (surrendered themselves) on ———, ——— /18.

CHARGE: 59 AW.

20. (Advising) (persuading) ——— to desert, ——— /18.
21. Knowingly assisting ——— to desert, ——— /18.

CHARGE: 60 AW.

22. Omitted; refer to officers only.

CHARGE: 61 AW.

23. Awol., from ——— to, ——— /18.
24. Absent from (retreat) (———), ——— /18.
25. Leaving place (of assembly) for (retreat) (———), ——— /18.

CHARGE: 62 AW.

26. Using (contemptuous) (disrespectful) (contemptuous and disrespectful) words against the ——— of the (United States) (———), ——— /18.

CHARGE: 63 AW.

27. Disrespect toward his superior officer, ——— /18.

CHARGE: 64 AW.

28. Willfully disobeying a lawful command of his superior officer, ——— /18.
29. Willfully (drawing) (lifting up) a ——— against his superior officer, ——— /18.
30. Willfully striking his superior officer, ——— /18.

CHARGE: 65 AW.

31. Willful disobedience of a lawful order of a NCO, ——— /18.
32. (Attempting) (threatening) to (strike) (assault) NCO, ——— /18.
33. (Insubordinate) (disrespectful) (insubordinate and disrespectful) behavior toward NCO, ——— /18.
34. Willfully (striking) (assaulting NCO, ——— /18.

CHARGE: 66 AW.

35. Attempting to create a mutiny, ——— /18.
36. Causing a mutiny, ——— /18.
37. Joining in a mutiny, ——— /18.

CHARGE: 67 AW.

38. Failing to give information of an intended mutiny, ——— /18.
39. With others attempting to break into a jail and release a prisoner, ——— /18
40. Not using his utmost endeavor to suppress a mutiny, ——— /18.

CHARGE: 68 AW.

41. Being engaged in a (quarrel) (fray) (disorder) and having been ordered into (arrest) (confinement) by ——— (refused to obey (drew a ——— upon) (threatened) him, ——— /18.

CHARGE: 69 AW.

42. (Breach of arrest) (escape from confinement), ——— /18.

CHARGE: 71 AW.

43. Refusing to (receive) (keep) a prisoner, while on duty as ———, ——— /18.

CHARGE: 72 AW.

44. As commander of the guard failed to report the name of a prisoner committed to his charge, ——— /18.

CHARGE: 73 AW.

45. [Without proper authority releasing prisoner] [suffering through (design) (neglect) prisoner to escape], ——— /18.

CHARGE: 74 AW.

46. Omitted; refers to officers only.

CHARGE: 75 AW.

47. (Abandoning) (delivering up to the enemy) ———, which (it was his duty) (he had been ordered) to defend, ——— /18.

48. Casting away his (rifle) (ammunition) while on duty before the enemy, ——— /18.

49. Being (present with) (in command of his ———) abandoned said ———, and (sought safety in the rear) (———), while engaged with the enemy, ——— /18.

50. Causing a false alarm in the (camp) (garrison) (quarters) (———), at ———, while on duty before the enemy, ——— /18.

51. Quitting his (company) (post) (———), at ———, to (pillage) (plunder) (pillage and plunder) while on duty before the enemy, ——— /18.

52. Running away from his (company) (———), which was then engaged with the enemy, ——— /18.

53. (Inducing) (seeking to induce) soldiers (and officers) to (abandon) (deliver up) to the enemy ———, which it was their duty to defend, ——— /18.

54. (Inducing) (seeking to induce) ———, then with his company engaged with the enemy, to (run away from) (abandon) his (post) (———), ——— /18.

55. (Inducing) (seeking to induce) ———, on outpost duty before the enemy to (run away from) (abandon) his (post) (———), ——— /18.

CHARGE: 76 AW.

56. In combination with others of his command compelled the commander to (surrender) (abandon) ———, to the enemy, ——— /18.

57. Jointly with others refusing to perform further duty in defense of ———, thereby compelling the commander thereof to (abandon) (surrender) said (fort) (post) (camp) (guard) (———), ——— /18.

CHARGE: 77 AW.

58. Giving to a person entitled thereto the wrong (countersign) (parole), ——— /18.

59. Making known the (countersign) (parole) to a person not entitled thereto, ——— /18.

CHARGE: 78 AW.

60. Violating a safeguard, ——— /18.

CHARGE: 79 AW.

61. Appropriating to (his own use) (———), public property taken from the enemy, viz, ——— of the value of $———, ——— /18.

62. Neglecting to secure for the service of the United States public property taken from the enemy, viz, ———, of the value of $———, ——— /18.

CHARGE: 80 AW.

63. (Buying) (selling) (———) (captured) (abandoned) property, viz, ———, of the value of $———, ——— /18.

64. Failing to report (captured) (abandoned) property coming into his (possession) (custody) (control), viz, ———, of the value of $———, ——— /18.

65. Failing to turn over (captured) (abandoned) property coming into his (possession) (custody) (control), viz, ———, of the value of $———, ——— /18.

CHARGE: 81 AW.

66. Informing an enemy patrol of the whereabouts of a United States patrol, ——— /18.

67. Knowingly (harboring) (protecting) (harboring and protecting) a member of the enemy's forces who was then being sought by a United States patrol, ——— /18.

68. (Holding correspondence with) (giving intelligence to) (holding correspondence with and giving intelligence to) the enemy, ——— /18.

69. Furnishing and delivering ——— to members of the enemy's army, to the value of $———, ——— /18.

CHARGE: 82 AW.

70. Acting as a spy, ——— /18.

CHARGE: 83 AW.

71. (Through neglect) (willfully) suffering ———, of the value of $———, military property of the United States, to be (lost) (spoiled by ———) (damaged by ———) [wrongfully disposed of by (sale to ———) (———)], ——— /18.

CHARGE: 84 AW.

72. [(Through neglect) (willfully)] [(injuring) (losing)] ———, of the value of $———, issued for use in the military service of the United States, ——— /18.

73. (Unlawfully selling to ———) (wrongfully disposing of by ———) ———, of the value of $———, issued for use in the military service of the United States, ——— /18.

CHARGE: 85 AW.

74. Found drunk while on duty as ———, ——— /18.

CHARGE: 86 AW.

75. Sleeping on post, ——— /18.

76. Leaving post before being regularly relieved, ——— /18.

CHARGE: 87 AW.

77 and 78 omitted; refer to officers only.

CHARGE: 88 AW.

79. Doing violence to, by striking and beating, an inhabitant bringing (supplies) (provisions) to (camp) (garrison) (quarters), ——— /18.

80. Acting jointly with (another) (others) interfered with an inhabitant bringing (supplies) (provisions) to (camp) (garrison) (quarters), ——— /18.

81. Intimidating an inhabitant, bringing (provisions) (supplies) (———) into (camp) (garrison) (quarters), by threatening to kill ——— if he continued to bring (provisions) (supplies) (———) into (camp) (garrison) (quarters) (———), ——— /18.

CHARGE: 89 AW.

82. Committing a depredation upon (an orchard) (———) by entering same without authority and (removing fruit from trees) (———), ——— /18.

83. Rioting in the public streets of ———, by (resisting and fighting against the peace officers of ———) (———), ——— /18.

84. Willfully destroying a growing crop (of oats) (———) by (permitting the horses of his troop to graze therein) (———), ——— /18.

85. Unauthorized (destruction of) (———) (a building) (———), ——— /18.

86. Omitted; refers to officers only.

CHARGE: 90 AW.

87. Using a (reproachful) (provoking) (reproachful and provoking) speech against ——— (accompanied with a provoking gesture), ——— /18.

CHARGE: 91 AW.

88 and 89 omitted; refer to officers only.

90. Fighting a duel, ——— /18.

91. Promoting a duel, ——— /18.

CHARGE: 92 AW.

92. Murder, killing ———, by (shooting him with a rifle) (———), ——— /18.

93. Rape, ——— /18.

CHARGE: 93 AW.

94. Arson, burning a (dwelling house) (———), ———/18.

95. With intent to (do him bodily harm) (commit a felony, viz, ———) striking (———) ——— (in) (on) the ——— with a ———, ——— /18.

96. Burglary, ——— /18.

97. Embezzlement of ———, of the value of $———, ——— /18.

98. Larceny of ———, of the value of $———, ——— /18.

99. Manslaughter, ——— /18.

100. Mayhem, cutting off the (hand) (arm) (———) of ———, ——— /18.

101. Perjury, in a (trial by court-martial of ———) (deposition for use in a trial by court-martial of ———) (military investigation) (civil suit) (———), ——— /18.

102. Robbery by (force and violence) (putting in fear) of ——— of the value of $——— (from ———), ——— /18.

CHARGE: 94 AW.

103. (Making) (causing to be made by ———) a (false) (fraudulent) (false and fraudulent) claim against the (U. S.) (——— at ———) (———), in the amount of $———, for (private property alleged to have been [lost] [destroyed] in the military service) (———), ———/18.

104. (Presenting) (causing to be presented by ———) for (approval) (payment) (approval and payment) a (false) (fraudulent) (false and fraudulent) claim against the (U. S.) (——— at ———) (———), in the amount of $———, for (services alleged to have been rendered to the U. S. by ———) (———), ——— /18.

105. Entering into an (agreement) (conspiracy) (agreement and conspiracy) with ———, to defraud the U. S. by (obtaining) (aiding ——— to obtain) the (allowance) (payment) (allowance and payment) of a (false) (fraudulent) (false and fraudulent) claim against the U. S., in the amount of $———, for (supplies) (———) alleged to have been furnished to the U. S. by ———, ——— /18.

106. (Making) (using) (making and using) a (false) (fraudulent) (false and fraudulent) statement for the purpose of (obtaining) (aiding others to obtain) the (approval) (al-

lowance) (payment) (approval, allowance, and payment) of a claim against the (U. S.) (——— at ———) (———), ——— /18.

107. (Advising) (procuring) (advising and procuring) the making of a (false) (fraudulent) (false and fraudulent) statement for the purpose of (obtaining) (aiding others to obtain) the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the (U. S.) (——— at ———) (———), ——— /18.

108. (Making) (advising the making of) (procuring the making of) (advising and procuring the making of) a false oath by ——— that ———, for the purpose of (obtaining) (aiding others to obtain) the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the (U. S.) (——— at ———) (———), ——— /18.

109. (Forging) (counterfeiting) (forging and counterfeiting) (the signature of ——— upon a ———) (a ———) for the purpose of (obtaining) (aiding others to obtain) the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the (U. S.) (——— at ———) (———), ——— /18.

110. (Advising) (procuring) (advising and procuring) the (forging) (counterfeiting) (forging and counterfeiting) by ———, of (the signature of ——— upon a ———) (a ———) for the purpose of (obtaining) (aiding others to obtain) the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the (U. S.) (——— at ———) (———), ——— /18.

111. (Using) (advising the use of) (procuring the use of) a (forged) (counterfeited) (forged and counterfeited) ——— for the purpose of (obtaining) (aiding others to obtain) the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the (U. S.) (——— at ———) (———), ——— /18.

112. Having (charge) (possession) (custody) (control) of (money) (———) (furnished) (intended) (furnished and intended) for the military service, knowingly (delivered) (caused to be delivered) to ———, (an) (a) (amount) (number) (quantity) less than the (amount) (number) (quantity) for which he received a (certificate) (receipt), at ———, ——— /18.

113. (Making) (delivering) (making and delivering) a paper certifying the receipt of property of the U. S. (furnished) (intended) (furnished and intended) for the military service, without having full knowledge of the truth of the statements therein contained and with the intent to defraud the U. S., ——— /18.

114. (Stealing) (embezzling) (misappropriating) (applying to his own use) (applying to his own benefit) (applying to his own use and benefit) (wrongfully selling) (knowingly and without proper authority selling) (wrongfully and knowingly selling) ———, ——— of the value of about $———, property of the U. S., ——— /18.

115. Wrongfully and knowingly (purchasing) (receiving in pledge) from ——— ——— (in) (employed in) the military service for an (obligation) (indebtedness) ———, of the value of about $———, property of the U. S., ——— /18.

CHARGE: 95 AW.

116 to 124 omitted; refer to officers only.

CHARGE: 96 AW.

125. Abandoning his guard, ——— /18.

126. Kicking a public (horse) (———) (in the belly) (———), ——— /18.

127. As (sentinel) (overseer) (———), in charge of prisoners, allowing a prisoner to (go to) (enter) (go to and enter) an unauthorized place, ——— /18.

128. As (sentinel) (overseer) (———) in charge of prisoners, allowing a prisoner to (hold unauthorized conversation with ———) (loiter) (neglect his task by ———) (obtain ———) (———), ——— /18.

129. As (sentinel) (overseer) (———) being in charge of prisoners, and having received a lawful order from ———, to require a prisoner to ———, failed to obey the same, ——— /18.

130. Appearing in civilian clothing without authority, ——— /18.

131. Appearing (at) (on) ——— (without his ———) (with his ——— not buttoned) (in an unclean ———) (———), ——— /18.

132. Attempting to (strike) (———) ——— (in) (on) the ——— with ———, ——— /18.

133. Striking (———) ——— (in) (on) the ——— with ———, ——— /18.

134. With intent to evade (duty) (———) feigning (illness) (disability) (insanity) (———), ——— /18.

135. (Attempting) (threatening) to (strike) (———) ——— a sentinel (in) (on) the ——— with ———, ——— /18.

136. (Striking) (———) ——— a sentinel (in) (on) the ——— with ———, ——— /18.

137. (Escaping) (attempting to escape) from confinement, ——— /18.

138. As a prisoner, using disrespectful language to a sentinel, ——— /18.

139. Having been restricted to the limits of ———, did break same, ——— /18.

140. Unlawfully carrying a concealed weapon, ——— /18.
141. (Urinating) (defecating) (———) (on the floor of the squad room) ———, ——— /18.
142. Willfully did, [(conceal) (remove) (mutilate) (obliterate) (destroy)] [attempt to (conceal) (remove) (mutilate) obliterate) (destroy)] [take and carry away with intent to (conceal) (remove) (mutilate) (obliterate) (destroy) (steal)] a public record, viz, (the descriptive list of ———) (———), ——— /18.
143. As a prisoner conspiring with ——— and ——— to escape from confinement, ——— /18.
144. Willfully destroying ———, property of the U. S., value about $———, ——— /18.
145. Through carelessness, discharging a (service rifle) (———) in his (squad room) (tent) (———), ——— /18.
146. (Failing to obey) (willfully disobeying) orders from a sentinel, ——— /18.
147. (Drunk) (disorderly) (drunk and disorderly) in (camp) (post) (quarters) (———), ——— /18.
148. (Drunk) (disorderly) (drunk and disorderly) in uniform, ——— /18.
149. As a sentinel, drinking intoxicating liquor with a prisoner under his charge, ——— /18.
150. While a prisoner, was found drunk, ——— /18.
151. Failing to obey a lawful order, ——— /18.
152. Violating (standing orders) (regulations), ——— /18.
153. Wrongfully using a narcotic drug, ——— /18.
154. Failing to pay a just debt, ——— /18.
155. Failing to report for prophylactic treatment, ——— /18.
156. Making a false official (report) (statement), ——— /18.
157. False swearing, ——— /18.
158. Forging (in its entirety) [by (altering ———) (erasing ———) (adding ———)] a certain (check) (———), ——— /18.
159. As (sergeant) (corporal) gambling with privates, ——— /18.
160. Gambling in quarters in violation of orders, ——— /18.
161. Indecent exposure, ——— /18.
162. (On behalf of another) loaning $——— for ——— (months) (days) per cent per (annum) (month), an usurious rate of interest, ——— /18.
163. While a sentinel, loitered on his post, ——— /18.
164. Obtaining by false pretenses (from ———) (the sum) (merchandise of the value) of $——— (———), ——— /18.
165. Refusing to submit to (medical treatment) (dental treatment) (a surgical operation), ——— /18.
166. Willfully maiming himself (by shooting himself with ———) (———), ——— /18.

167. While a sentinel, sitting down on his post, ——— /18.
168. Sodomy committed upon the person of one ———, ——— /18.
169. Straggling while (on practice march) (at maneuvers), ——— /18.
170. Knowingly procuring ——— to commit perjury, by inducing him knowingly to (give false testimony) (make a false [declaration] [certificate] [deposition]) as to a material matter in a trial (by court-martial) (———), ——— /18.
171. With intent to defraud, knowingly uttering to ——— a forged (written instrument) (———), ——— /18.
172. Breach of parole, while a prisoner, ——— /18.
173. With intent to (maim) (disfigure) ——— willfully [(cutting) (biting) (———) the (nose) (ear) (———) of ———] [(throwing) (pouring) corrosive acid upon] the said ———, ——— /18.
174. Knowingly receiving stolen goods of the value of $———, ——— /18.

APPENDIX 8.

SUGGESTIONS FOR TRIAL JUDGE ADVOCATES.

The trial judge advocate of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of its proceedings. (A. W. 17.)

The following notes, indicating more or less in proper sequence certain action usually proper to be taken by a trial judge advocate, may be found useful:

1. UPON RECEIPT BY AN OFFICER OF AN ORDER APPOINTING HIM TRIAL JUDGE ADVOCATE OF A COURT-MARTIAL.

1. Examine the order and any amendatory orders carefully and take appropriate action to cause the correction of any substantial irregularity therein.

2. Examine and study such portions of the Manual for Courts-Martial, Digest of Opinions of the Judge Advocates General, Army Regulations, and War Department or other orders affecting courts-martial as may appear desirable. He should, in this connection, give particular attention to the duties of trial judge advocates, to the procedure of courts-martial, and to the matter of evidence.

2. UPON RECEIPT OF CHARGES IN A CASE.

1. Prepare an envelope to contain the papers pertaining thereto.

2. Examine the charges and all papers received to see that none appear to be missing; that the charges appear to be correctly drawn; that the summaries of the statements of the witnesses on the preliminary investigation and the other accompanying documents mentioned in paragraph 77 (*b*), M. C. M., are all in order; that the order of reference for trial is indorsed in the prescribed form on one original counterpart of the charges; that the evidence of previous convictions, if any, is complete and correct, especially as to dates, authentication, proper signatures, etc.

3. Make—(taking care to initial each)—any authorized necessary changes in charges; and take proper action in connection with defects, if any, found in evidence of previous convictions.

4. Report to the appointing authority necessary or desirable changes which the trial judge advocate is not authorized to make.

5. Serve the accused with a copy of the charges and of the other papers required by paragraph 77 (*b*), M. C. M., and sign certificate of such service in the prescribed form on the same counterpart of the charges upon which the order of reference for trial is indorsed (which is the counterpart to be retained by the trial judge advocate during the trial and returned to the convening authority with the record of trial).

6. Consult the defense counsel of the court and ascertain from him whether the accused desires individual counsel, and, if asked to do so, assist in arranging for such individual counsel as the accused may desire.

7. Prepare case for trial, investigating it thoroughly, and determining upon plan of prosecution.

8. Arrange with president date and time of meeting of court.

9. Arrange for court-martial room, see that it is in order, provided with necessary tables, chairs, stationery, and room to be heated, if necessary.

10. Notify all members of date and time of meeting and arrange for presence of other necessary persons, including the defense counsel, the accused, and his individual counsel, reporter, interpreter, if required, and witnesses.

11. Arrange to have at trial such books, etc., as may be required. The following are frequently found necessary or useful:

Manual for Courts-Martial.
Digest of Opinions, Judge Advocates General.
Standard Text on Military Law.
Ordnance Price List.
Clothing Price List.

12. Determine maximum punishment, if any, imposable upon conviction of each of the several offenses charged, and be prepared to advise the court thereof.

3. UPON THE ASSEMBLING OF THE COURT.

1. Note officers present and absent, members of the court including the law member, trial judge advocate and assistants, defense counsel and assistants.

2. When the court appears ready to proceed, announce the readiness of the prosecution to proceed with the trial of ——— ———, and the presence of the defense counsel, and inquire of the defense counsel and the accused whether the accused desires to introduce any individual counsel (to be ordinarily introduced, if there be individual counsel, by the defense counsel).

3. Swear reporter, if any.

4. Before a general court-martial, or a special court-martial where the evidence is to be recorded, ask accused if he desires a copy of the record of his trial, and see that his answer appears in the record. If he does not, do not have carbon copy of the record of trial of a special court-martial made; if he wishes copy, direct reporter to prepare one. (Pars. 359 and 366 (b), M. C. M.); and direct reporter to prepare a carbon copy of record of general court-martial trial in any case (par. 355a, M. C. M.).

5. Read aloud to accused the order appointing the court and each modifying order.

6. If it is expected to call any member of the court as a witness, or if any member is known to be an accuser, announce that fact and request the court to excuse such member.

7. Request that any member of the court who has formed an opinion concerning the case or any of the material facts, or who for any other reason thinks himself disqualified, or is aware of any facts which he believes might cause either party to desire to challenge him, to so announce (see par. 126, M. C. M.) in order that he may be excused or challenged. In a proper case, request the court to excuse any member upon such announcement.

8. Exercise the right of challenge in a proper case. (See par. 120, M. C. M.)

9. After concluding challenges for the prosecution, ask accused if he objects to being tried by any member present named in the order convening the court and in the modifying orders, if any.

10. After action on a challenge by the accused, if any is made, has been had, again ask the accused if he objects, as above. Continue this until accused has no further objection.

11. Ask the accused (if the accused has not exercised his right of peremptory challenge) whether he desires to challenge any member of the court present peremptorily.

12. Swear members of the court.

13. Be sworn by the president.

14. Read charges and specifications, including the signature and the oath thereto, and the order of reference for trial, aloud slowly to the accused, and, having done so, ask him how he pleads to the first specification, first charge—if necessary, rereading to him the specification; then how he pleads to the second specification, first charge, etc.; then to the first charge, etc.

15. If there be any special pleas, e. g., to the jurisdiction of the court, of a pardon, of the statute of limitations, or the like, they will properly be interposed at this point.

16. If it appears on the face of the record that the accused might successfully plead the statute of limitations, the law member of a general court-martial, if present, or otherwise the president, or the president of a special court-martial, will at this point advise the accused of his legal right to plead the statute of limitations, and that, if he does not plead it, it will be considered as waived. (See par. 149 (*h*), M. C. M., and form Appendix 9.)

17. Read to the court from the chapter on punitive articles, M. C. M., the paragraph or paragraphs, or parts of paragraphs, that set out the gist of each offense charged, stating for the record which paragraphs, or parts of paragraphs, are read.

18. If there be a plea of guilty, the law member, or president, as the case may be, makes to accused the required explanations and asks him the required questions. (See par. 154 (*d*), M. C. M., and form Appendix 9.)

In case accused lets a plea of guilty stand, then warn the accused in open court of his right to introduce evidence under such plea in explanation of his offense. (Par. 96, M. C. M.)

19. If desired, make at this point a brief opening statement, outlining the case to the court. (See par. 197, M. C. M.)

20. Introduce and swear witnesses for the prosecution. In some cases it may be desirable to acquaint the court with the particular specification with which the testimony of a particular witness is connected.

21. In all cases attempt to establish by evidence each of the several specifications, except such elements as may be the subjects of judicial notice or as are formally admitted.

22. Examine each witness, having careful regard for the rules of evidence.

By your first questions carefully identify the accused by his:

(1) Name,
(2) Army serial number, if an enlisted man, and
(3) Grade and organization; and also
(4) That the accused person present in court is the very same person about whom the witness is testifying.

23. Offer opportunity to cross-examine.

24. Reexamine, if desirable.

25. Ask court if there are any questions by the court.

26. If any witness is recalled, remind him that he is still under oath.

27. When the prosecution has nothing further to offer for the time, announce that the prosecution rests.

28. Ask defense counsel, or other counsel for the accused, whether he desires to make an opening statement.

29. Swear witnesses for defense, in succession, and cross-examine so far as desirable.

30. If the accused testifies in his own behalf, make sure that he does so at his own request, and that the record so shows.

31. If the accused does not request to be sworn as a witness, he may make an unsworn statement to the court. Make sure that the record is clear as to what the accused does in this respect.

32. If the accused does not testify or make any statement in his own behalf, invite the attention of the court to the explanation required to be made to the accused under paragraph 215, M. C. M., and make sure that the explanation is properly made; and that it, together with the answers of the accused thereto, is noted in the record. (For form see Appendix 9.)

33. After defense rests, swear and examine witnesses, if any, in rebuttal for prosecution.

34. Ask the court whether any witnesses are to be called for the court.

35. Offer accused opportunity to make a statement and argument.

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36. Make sure, and see that it appears in the record when the time comes, that the accused has no further evidence to offer, testimony to give, or statement or argument to make.

37. Make closing statement or argument.

4. ADJOURNMENT DURING TRIAL.

1. Note time of adjournment (hour and date).

2. Arrange, if practicable, to have completed record of proceedings to date ready before next assembling of court.

3. Subscribe the record of proceedings for the day.

5. FINDINGS.

1. After both prosecution and defense have concluded the court closes for findings.

2. After making its findings the court is reopened, and in case of acquittal the president announces the acquittal in open court.

Otherwise, the court will ask for the evidence of previous convictions, if any, in which case the trial judge advocate will read aloud duly authenticated evidence of any previous convictions referred to the court by the appointing authority, or (if such be the fact) state that there is no such evidence to be presented.

3. Invite the attention of the court to any apparent irregularity in the evidence of previous convictions.

4. In case such evidence of previous convictions is offered, ask the accused whether the evidence of such previous convictions is correct and whether he has any statement to make in explanation or extenuation thereof or in relation thereto.

5. Read aloud the statement of service of the accused as shown on the charge sheet, and ask the accused whether the same is correct and whether he has any corrections to state or any statement to make in relation thereto.

6. SENTENCE.

1. The court will then close to determine upon and award sentence (except in case of acquittal).

2. After awarding the sentence the court is opened and the president announces the findings and sentence in open court (except in those rare cases where the court has ordered, under paragraph 332a, M. C. M., that the findings and sentence should not be announced, in which case the president announces that fact).

3. Invite the attention of the court to any apparent irregularity in the findings or sentence.

7. ADJOURNMENT AT CLOSE OF TRIAL.

1. After acquittal or sentence has been announced the court either proceeds to other business or adjourns.

2. Note time (hour and date) of proceeding to other business or of adjournment.

3. Notify commanding officer in writing, direct, of result of trial. (See Par. 332a, M. C. M.)

8. AFTER TRIAL.

1. Complete vouchers for civilian witnesses and deliver same if practicable before the witnesses leave.

2. In those rare cases where the court has not announced the sentence, but has ordered that it be not announced, under paragraph 332a, M. C. M., take proper measures to insure the security of the findings and sentence, and that they are not disclosed to any but the proper authority.

3. When record is received back from reporter:

(*a*) Examine carefully to see that it is in proper form, complete, and correct as to both form and substance.

(*b*) Make proper notation on index sheet as to copy of record. Deliver copy (if any) to accused personally, and get his receipt (or make affidavit of delivery) and attach same to record.

(*c*) See that copies of evidence of previous convictions, if any, are correct, certify same, and return originals to organizations.

(*d*) If not so attached, attach index sheet and all exhibits.

(*e*) Attach charges and all other papers received from the convening authority, as required by paragraphs 79 and 357(b) (or 358), M. C. M.

(*f*) See that record is *securely bound.*

4. See that findings and sentence are properly transcribed. (In those rare cases where under paragraph 332*a*, M. C. M., the findings and sentence have not been announced in open court, enter findings and sentence, and if so entered in typewriting add proper certificate.) (See par. 357(b), item 55, M. C. M.)

5. Authenticate record.

6. Have president (or in his absence a member) authenticate record.

7. Certify original voucher and send it to reporter or to a near by disbursing finance officer, and inclose copy with record of trial.

8. Verify completeness and correctness of record by making sure that, so far as necessary in the particular case, each requirement stated in Chapter XV, Section I, paragraph 357(*b*), (or 358) M. C. M., has been complied with.

9. By separate letter of transmittal, placed on the front of (and bound with) the record of trial, forward charges with record of trial, with original charge sheet and all other papers received with the

case, to the appointing authority; and also, if the trial was by general court-martial, the carbon copy of the record, if not desired or accepted by accused.

9. WEEKLY REPORT.

Each Saturday, report through the president of the court and the commanding officer all charges, if any, which have been on hand more than two weeks, and which have not been returned to the appointing authority, showing date of receipt of each and reasons for delay in trial.

10. RECORD WHICH MAY BE KEPT.

It is suggested that when deemed desirable at least the following record be kept by the trial judge advocate in each case. This record may be conveniently kept on an envelope to be used as a container for the charges and various papers:

Date of receipt by him of charges or other papers.

Date of service of charges and other papers on accused.

Date of preliminary consultation with defense counsel.

How accused intends to plead, if stated by defense counsel.

Individual counsel for accused:

Desired? If so, name?

If so, date on which commanding officer was informed.

Date on which trial judge advocate was informed of appointment of individual counsel.

Result of examination in preparing for trial, and dates and other necessary facts pertaining to each other incident connected with the case, such as mailing interrogatories, subpœnaing witnesses, etc.

Date of trial.

Date and hour commanding officer was notified of result of trial. (See par. 332a, M. C. M.)

Date and hour record received back from reporter.

Date and hour record forwarded to appointing authority.

Date of return to commanding officer of evidence of previous convictions, if any, to be so returned.

APPENDIX 9.

FORMS FOR USE OF PRESIDENT OR LAW MEMBER.

FORM I.

FORM OF RULING IN OPEN COURT.

1. *Ruling by president of special court-martial or by president of general court-martial in absence of law member, on any question arising during the trial, except on (1) a challenge, (2) the findings of the court, and (3) the sentence.*

The ruling may be substantially in this form:

It is the opinion of the president that (*stating his opinion*) and such will be the ruling of the court unless some member objects. Are there any objections? (*Pausing for objections.*) (*If there are no objections, add:*)

"No member objecting, the ruling of the court is that the objection (*is or is not sustained*) and that the question (*will or will not*) be answered" (*or whatever the ruling may be*).

If any member objects, the court will close to consider and vote on the question. (*A. W. 31, and par. 89, M. C. M.*).

2. *Ruling by law member of a general court-martial.* (*Whenever present, the law member of a general court-martial rules in open court on all questions arising during the trial, except on (1) a challenge, (2) the findings of the court, and (3) the sentence.*)

It is the opinion of the law member that (*stating his opinion*). It is therefore recommended that the objection be (*sustained* or *not sustained*) and that the question (*be* or *not be*) answered. (*Addressing the president.*)

(*The record will show that the president thereupon announced the opinion of the law member as the ruling of the court. Such announcement may be substantially in this form:*)

Under the thirty-first article of war the recommendation of the law member is the ruling of the court. Accordingly the objection is (*sustained or not sustained*) and the question will (*be or not be*) answered.

3. (*If the ruling by the law member be upon any question other than the admissibility of evidence, so that under the provisions of A. W. 31, and of paragraphs 89 and 89a, M. C. M., it is subject to objection by a member of the court, the president will announce the ruling in the following form:*)

Under the thirty-first article of war the opinion and recommendation of the law member is made the ruling of the court and will stand as such, unless any member object thereto. Are there any objections?

(*If no member objects the president will announce:*)

There being no objection the recommendation of the law member is, under the thirty-first article of war, the ruling of the court, and the objection is (*sustained or not sustained*) and the question will (*be or not be*) answered (*or whatever the ruling may be*).

If, however, in such a case, any member objects to the ruling, the court will be closed and proceed to consider and vote upon the question. (*See A. W. 31; and par. 89a, M. C. M.*)

FORM II.

EXPLANATION OF THE RIGHT OF ACCUSED TO PLEAD THE STATUTE OF LIMITATIONS. (See Par. 149 (h), M. C. M.)

(*To be made by the president of a special court-martial, or by the president of a general court-martial in the absence of the law member, or by the law member of a general court-martial whenever present.*)

(Private Doe), it appears on the face of these charges that the offenses with which you are charged (*or, the offenses alleged in specification ——— under charge ———, as the case may be*) were committed more than (*two years or three years*) ago. It, therefore, appears that if you wish to do so you are legally entitled to plead what is known as the statute of limitations, that is, that under the thirty-ninth article of war you are not now liable to be tried or punished therefor, because of the time that has gone by. If you take advantage of your rights under the thirty-ninth article of war by pleading it at this time you can not be tried for such offenses, unless the prosecution can show some legal justification for the delay in bringing you to trial; but you do not have to take advantage of this statutory time limit unless you desire to do so. But, if you do not do so, and do not raise this objection—that is, unless you plead the statute of limitations, as it is called, or raise this objection to being tried on account of the delay in bringing you to trial—this court will proceed to try you, and if you should be found guilty will have power to punish you for such offenses, regardless of how long ago the offenses were committed. Do you understand all I have said to you?

A. ———.

Q. Do you understand what I mean? That if you do not take advantage of this right you will lose it?

A. ———.

Q. Knowing your rights, do you not want to object to this trial proceeding because of the length of time that has gone by since the commission of the acts charged against you; that is, do you not desire to plead the statute of limitations?

A. ———.

FORM III.

EXPLANATION TO THE ACCUSED OF PLEA OF GUILTY.

(To be made by a summary court (see par. 351 (d), M. C. M.), by the president of a special court-martial, or by the president of a general court-martial in the absence of the law member, or by the law member of a general court-martial whenever present. (See par. 154 (d), M. C. M.)

Such explanations and questions may be in substantially the following form, varied to suit the particular charges and specifications; but the law member or president will not confine himself to a stereotyped statement in this form, but will in all cases elaborate it sufficiently to assure himself (as well as to make it appear in the record) that the accused actually understands all the essential elements of each offense to which he has offered a plea of guilty and understands what the specifications allege, and also clearly understands the maximum punishment that may be adjudged thereon, and actually comprehends that by pleading guilty he admits having committed all of the various elements of the crimes or offenses charged, and understands that he may, upon a plea of guilty, actually be punished as stated. The explanation should include at least substantially what follows:

THE LAW MEMBER (or the president, in the absence of the law member):

(Private Doe), it is my duty to tell you that in pleading guilty to (*Specification ——— or Charge ———, insert the number of the specification or of the charge, as the case may be*) you are admitting that you are actually guilty of all of the things that are charged against you in that (*Specification or Charge*); that is, that you actually committed all the elements of the offense charged. Those elements or parts of the offense consist of certain acts committed with a certain intent. The elemental acts charged and which you admit by pleading guilty are (*here read over the specification or specifications to which the plea of guilty is offered, phrase by phrase, each phrase being an elemental fact, if the specification is properly drawn, and explain them carefully in simple language, making sure that the accused actually understands them. Then continue:*) As to the intent with which the acts were committed, you admit by your plea of guilty that you knowingly did these things; that is, you knowingly committed those acts as charged and of which you plead guilty, and that you were conscious and knew what you were doing and that you intentionally committed those acts; that is, that you had the intention to commit the offense of (*desertion, larceny, burglary, etc.*), with which you stand charged here; that no one forced you to do it, or any part of it, but that you did those acts all of your own

free will, not under any compulsion nor misunderstanding of the facts or innocently, but with the intention of committing this (*crime or offense*). (*If desertion, add*): and you are further informed that the word "desert" includes the charge that, either at the time you left or at some time during your absence, you had the intention not to return to your proper station, or else that you left for the purpose of avoiding hazardous duty or shirking important service, as stated in the specifications to which you are pleading guilty; and you are further informed that the maximum penalty which the court may impose upon you under your pleas of guilty is (*be sure to state all of the elements of the maximum punishment which may be awarded, including, if imposable, dishonorable discharge, forfeiture or detention of pay and allowances, as well as confinement or other punishment*). (*In a proper case, add:*) If evidence is presented to the court, which it can properly consider, of five or more previous convictions against you, you may, in addition, be dishonorably discharged from the service and ——— months' confinement at hard labor may be adjudged against you. Do you fully understand all that I have said to you?

A. ———.

Q. Do you also fully understand that by pleading guilty to Specification ——— (*or Charge* ———, *as the case may be*), you admit having committed all of the elements of the crime or offense charged, as I have explained them to you?

A. ———.

Q. Do you also understand fully that upon your plea of guilty you may be punished as I have stated?

A. ———.

Q. You may either let your pleas of guilty stand, or you may now, if you wish, change them or any of them to "not guilty." If you change them to "not guilty," then the prosecution will have to present the necessary evidence to prove you guilty before the court can find you guilty or punish you.

Now, knowing all this do you still want your pleas of guilty to stand, or do you want to change them or any of them to "not guilty"?

A. ———.

FORM IV.

EXPLANATION TO THE ACCUSED OF HIS RIGHTS AS A WITNESS.

(*To be made by a summary court, or by the president of a special court-martial, or by the president of a general court-martial in the absence of the law member, or by the law member of a general court-martial whenever present; see par. 215, M. C. M.*).

(Private Doe), it is my duty to tell you that you have the legal right now to do any one of several things, just as you

choose. First, if you want to do so, you may be sworn as a witness and testify under oath in this case like any other witness; or second, if you do not want to be sworn as a witness you may, without being sworn, say anything about the case to the court which you desire—that is, make what is called an unsworn statement—or you may, if you wish, file a written statement with the court; or third, you may, if you wish, keep silent and say nothing at all. I will explain these rights to you in order:

First. If you desire to be sworn as a witness and testify in your own behalf, you may do so, but you are not required to do so, and you can not be sworn unless you ask it. If you are sworn as a witness in your own behalf that means that you take the witness stand like any other witness and promise, under oath, that you will tell the truth, the whole truth, and nothing but the truth, about this case. If you do that, whatever you say will be considered and weighed as evidence by the court just like the testimony of any other witness, and you can be cross-examined like any other witness—that is, the trial judge advocate[1] and any member of the court can question you to find out whether or not you are telling the truth and what weight should be given to your testimony. Their questions will not be confined to just that part of your denial or explanation which you may give while testifying yourself under the guidance of your counsel, but they can question you about the whole subject of the offense charged against you, and may also ask you questions to test your worthiness of belief; (*if, as is usually the case, there are more than one specification*) but if your testimony should only be in denial or explanation of any statement about just one or two of the offenses charged against you here, and not about the others, and you should not say anything about the others, then they can question you about the whole subject of those offenses concerning which you testify, but they can not question you about any offenses concerning which you do not testify.

If you do take the witness stand and fail to deny or satisfactorily explain any of the alleged wrongful acts about which you testify at all, and about which any evidence has been presented against you here, such failure on your part may be commented on to the court by the trial judge advocate when he presents his argument to the court at the end of the trial, and the court can take it into consideration in determining whether you are guilty or innocent of the offenses. Do you understand fully all that I have said to you so far? If not, tell me and I will try to make it clearer.

A. ———.

[1] Summary court will omit inapplicable words and phrases.

(If the accused says that he does not understand it fully, or if he does not appear fully to understand all that has been said, go over it again and elaborate it until he does fully understand it, then proceed:)

Second. Your second choice is, that if you do not want to testify under oath you may, without being sworn, say anything you desire to the court as an unsworn statement, denying, explaining, or excusing any of the acts charged against you here. You can do this yourself, or you can have your counsel do it for you, or you can do both; that is, you may say anything you desire yourself in this way, and have your counsel add anything else for you which you want him to do. In making such a statement you are not a witness and do not have to take an oath and can not be questioned or cross-questioned by anyone. If you wish you can file your statement in writing, or have your counsel file a written statement for you, or you may both make an oral statement and also file a written statement, if you want to do so. In such statement you can refer to the evidence produced against you here and you can explain your motive in doing anything you may have done, or you can deny or contradict any of the testimony given or offer any excuse or explanation you see fit, and you may also, if you wish, discuss the legal principles applying to your case and make an argument to the court, both upon the facts of the case and upon the law. Since such a statement is not given under oath, and you can not be cross-examined upon it, it can not be given the same weight with the court as sworn testimony under oath, but it will be considered by the court and given such weight as it may seem to deserve. Furthermore, even though you may be sworn as a witness you may also, if you wish, afterwards make a statement of this kind, not under oath, either verbally or in writing. Do you understand clearly all that I have said thus far? If not, tell me and I will explain it again and try to make it clearer.

A. ———.

(As before make sure that the accused understands, and then proceed:)

Third. Your third choice, if you do not want to testify as a witness in your own behalf, and do not desire to make an unsworn statement, either orally or in writing, is, if you so wish, to remain silent; to say nothing at all. You have a perfect right to do this if you wish, and if you do so the fact that you stand on your legal rights and do not take the witness stand yourself, or make any statement, will not count against you in any way with the court. It will not be considered by the court as any admission that you are guilty, nor can it be commented on in any way by the trial judge advocate in addressing the court. It is your legal right to remain silent if you wish

to do so. Do you now understand all that I have said? If not, tell me and I will explain it more fully and try to make it clear to you?

A. ———.

(*Make sure as before that the accused fully understands, then proceed:*)

Q. Do you understand now your right to do any one of these different things as I have explained them to you; that is, first, to testify as a witness, if you wish; second, to make an unsworn statement, either verbally or written, as you wish, or both, either without having been sworn as a witness or in addition to your testimony if you shall be sworn; and third, your right to remain silent and say nothing at all?

A. ———.

Knowing these various rights, take time to consult with your counsel and then state to the court which you will do.

APPENDIX 10.

FORM FOR RECORD OF TRIAL BY GENERAL COURT-MARTIAL, AND REVISION PROCEEDINGS.

Record of Trial by General Court-martial[1] of

PRIVATE ————, A. S. No. ————, COMPANY ——, —— INFANTRY.

INDEX.

	Page.
Arraignment	
Pleas	
Statement by accused	
Address by counsel	
Reply by trial judge advocate	
Findings	
Previous convictions submitted	
Sentence (*or* acquittal)	
Proceedings in revision	

TESTIMONY.

Name of witness.	Direct.	Cross.	Redirect.	Examination by court.	Recalled.
	Page.	*Page.*	*Page.*	*Page.*	*Page.*
.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....

[1] See "Courts-martial, Records of trial, Chap. XV." The record will be clear and legible and, if practicable, without erasure or interlineation.

Erasures or interlineations will be authenticated by the initials of the trial judge advocate or of the president, or, in a proper case, of the assistant trial judge advocate.

The pages of the record will be numbered at the bottom, and margins of 1 inch will be left at the top, bottom, and left side of each page.

EXHIBITS.

	Number.	Page where introduced.
Deposition of Capt. ———		
Deposition of Pvt. ———		
Letter of ———		
Morning report of Company —, — Infantry		
Knife		

Carbon copy of the record [a]	not desired by accused / and forwarded herewith [2] / furnished the accused	Receipt (*or*) Affidavit of delivery.	Attached to record.

Proceedings of a general court-martial which convened at ———, ———, pursuant to the following order (*or* orders):

(Here insert a literal copy of the order appointing the court and, following it, copies of any orders modifying the detail.) [3]

Fort ———, ———,
———, ———, 19—.

The court met pursuant to the foregoing order (*or* orders) at ——— o'clock —.

PRESENT.[4]

Col. ———, 5th Cavalry.
Lieut. Col. ———, 1st Infantry.
Lieut. Col. ———, 3d Field Artillery.
Maj. ———, J. A. G. D., law member.
Maj. ———, 3d Field Artillery.
Capt. ———, 4th Infantry.
Capt. ———, 5th Cavalry.
Capt. ———, 5th Cavalry, trial judge advocate.
First Lieut. ———, 3d Field Artillery, assistant trial judge advocate.
Capt. ———, 4th Infantry, defense counsel.
Capt. ———, 4th Infantry, assistant defense counsel.

[a] A carbon copy will always be prepared whenever the record is to be typewritten by a reporter. (See pars. 355a, 357(b), and 366(b), M. C. M.)

[2] Line out inappropriate words.

[3] Words in italics will not be copied into the record.

[4] In the record of the proceedings of a court-martial at its organization for the trial of a case the officers detailed as members (including, and so designating, the law member), trial judge advocate, assistant trial judge advocate, defense counsel and assistant defense counsel, will be noted by name as present or absent. In the record of the proceedings of subsequent sessions in the same case (except in proceedings in revision) the following form of words will be used, subject to such modification as the facts may require: "Present, all the members of the court, the trial judge advocate, the assistant trial judge advocate, the defense counsel, and the assistant defense counsel."

ABSENT.[5]

Capt. ———, 1st Infantry (detached service).

Capt. ———, 3d Field Artillery (leave of absence).

The court proceeded to the trial of Private ———, Army Serial Number ——, Company ———, —— Infantry, who, on appearing before the court (introduced ——— as his individual counsel) *or* (stated, upon being asked by the defense counsel in open court, that he did not desire to introduce any individual counsel, and was defended by the defense counsel).

——— was sworn as reporter.

(*If an interpreter is to be used he should be sworn when his services are required.*)

The order appointing the court (and the order *or* orders modifying the detail, *if any*) was (*or* were) read to the accused.

Capt. ———, 4th Infantry, announced that he was the accuser in the case and was excused and withdrew.

(*Insert here any challenge by the trial judge advocate, and the action thereon; see par. 120, M. C. M.*)

The accused was asked if he objected to being tried by any member present named in the order or modifying orders appointing the court, or desired to exercise his right to one peremptory challenge against any member except the law member; to which (after being in open court advised of his right to do both or either, if he desired) he replied in the negative; *or*

Defense: (*Insert statement.*)

(*In case of a peremptory challenge by either side the challenged member will be excused by the president and forthwith withdraw.*)

(*Except in case of a peremptory challenge insert the statement of the challenged member, who ordinarily should respond to the challenge by briefly admitting or denying the grounds of the challenge. Should the accused, after the statement, desire to call upon the member to testify as to his competency, the record should continue:*)

The accused having requested that the challenged member be sworn as to his competency to act as a member of the court, ——— was sworn by the trial judge advocate, and testified as follows:

(*Evidence pro and con may be introduced, and, except in cases where the member is the accuser or a witness for the prosecution, and such fact is admitted, challenges which are not withdrawn must be passed upon by the court. In such case the record will proceed:*)

The challenged member withdrew, the court was closed and voted upon the challenge by secret written ballot, and, upon being opened,

[5] A member of a court-martial, or a defense counsel, who knows, or has reason to believe, that he will, for proper reason, be absent from a session of the court, will inform the trial judge advocate accordingly. When a member of a court-martial, or a defense counsel, is absent from a session thereof, the trial judge advocate will cause that fact, together with the reason for such absence, if known to him, to be shown in the record of the proceedings. If the reason for such absence is not known to the trial judge advocate, he will cause the record to show the member as absent, cause unknown.

the president announced in the presence of the trial judge advocate, the assistant trial judge advocate, the defense counsel and the assistant defense counsel, the accused and individual counsel, if any, for the accused, that the challenge was (*not sustained*) *or* (*sustained*).

(*If the challenge is sustained:*) ——— then withdrew.

The accused was asked if he objected to any other member present, to which he replied in the negative, *or*

Defense:

(*Insert objection—or peremptory challenge, as the case may be—in full in the record, and continue as before until accused replies in the negative.*)

The members of the court, the trial judge advocate, and the assistant trial judge advocate were then sworn.

(*A nolle prosequi may be entered either before or after arraignment and plea; par. 158, M. C. M.*) (*The following form may be used:*)

Prosecution: By direction of ———, the officer who ordered this court, the prosecution withdraws the following charges and specifications and will not pursue the same further at the present trial.

(*If delay is desired, request should now be made and the proceedings recorded. If no continuance is requested, the record should continue:*)

The accused was then arraigned upon the following charges and specifications:[6]

CHARGE I: Violation of the ——— Article of War.

Specification: In that, etc.

CHARGE II: Violation of the ——— Article of War.

Specification 1: In that, etc.

Specification 2: In that, etc.

(Signature of accuser)_____

(Name and grade.)

(Organization and corps, service or department)_____

AFFIDAVIT.[6]

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this ——— day of ———, 19—, and, made

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[6] All words that precede the charge proper are not parts of the charges *and will not be copied into the record,* but the name, grade, and organization of the person subscribing the charges and the affidavit thereto, and the order of reference for trial, will be copied into the record after the charges and specifications.

[a] (1) At (*) strike out words not applicable.

(2) If the accuser has personal knowledge of the facts stated in one or more specifications or parts thereof, and his knowledge as to other specifications or parts thereof is derived from investigation of the facts, the form of the oath will be varied accordingly. In no case will he be permitted to state alternatively, as to any particular charge or specification, that he either has personal knowledge or has investigated. (See note to par. 75, M. C. M.)

(3) If the oath is administered by a civil officer having a seal, his official seal should be affixed.

oath that he is a person subject to military law and that he personally signed the foregoing charges and specifications, and further that he * has personal knowledge of the matters set forth in specifications ——————————————————; and * has
(Indicate by specification and charge numbers.)
investigated the matters set forth in specifications ——————————
(Indicate
——————————————————, and that the same are true
by specification and charge numbers.)
in fact, to the best of his knowledge and belief.

(Name)——————————————————
(Rank and organization.)

——————————————————
(Official character, as summary court, notary public, etc.)

(*Copy in here also—showing that it was read to the accused as a part of the arraignment—the order referring the case for trial.*)

(*In the case of a plea to the jurisdiction or of the statute of limitations, or other special plea, the record will show it fully and the action thereon, after which it will show the pleas on the general issue* [*guilty or not guilty*].)

The accused then pleaded as follows:

To the Specification, Charge I: Guilty *or* Not guilty.

To Charge I: Guilty *or* Not guilty.

To Specification 1, Charge II: Guilty *or* Not guilty.

To Specification 2, Charge II: Guilty *or* Not guilty.

To Charge II: Guilty *or* Not guilty.

The following paragraphs or parts of paragraphs of the Manual for Courts-Martial that set out the gist of each of the several offenses charged were read to the court by the trial judge advocate, to wit:—

(*If it appears upon the face of the charges that the accused might successfully plead the statute of limitations thereto, or to any specification or charge, but has not interposed such a plea, the record will show at this point that the law member, if present—or in the absence of the law member the president—advised the accused of his legal rights in the premises (par. 149 (h), M. C. M.), and such advice and the response of the accused thereto will appear in full in the record at this point. Such advice may be substantially in the form set forth in Appendix 9, Form II.*)

(*In case the accused pleads guilty in whole or in part to any charge or specification, the record will show that the law member, if present, or in his absence the president of the court, made to the accused the explanation and asked him the questions required by paragraph 154 (d), M. C. M., and the answers of the accused to such questions. Such explanations and questions may be substantially in the form set forth in Appendix 9, Form III.*)

(*If the accused then abides by a plea of guilty, the trial judge advocate will formally advise him in open court of his right to introduce evidence in explanation or extenuation of his offense and should assist*

him and the defense counsel and any other counsel for the accused in securing it; par. 96, M. C. M.)

(*The opening statement of the trial judge advocate will be inserted in the record at this point.*)

Sergt. John Jones, Company ———, ——— Infantry, a witness for the prosecution, was sworn and testified as follows:

Q. Do you know the accused? If so, state who he is.

A. I do; Private ———.

Q. Is he in the military service of the United States?

A. ———.

(*If accused is not in the military service of the United States, show how otherwise subject to military law.*)

Q. What is his grade and organization?

A. ———.

Q. What is his Army serial number?[7]

A. ———.

(*The succeeding questions of the prosecution and their answers should follow in order.*)[8]

CROSS-EXAMINATION.

Questions by defense:

Q. ———?

A. ———.

(*If the defense declines to cross-examine the witness the record should state:*)

The defense declined to cross-examine the witness.

REDIRECT EXAMINATION.

Questions by prosecution:

Q. ———?

A. ———.

RECROSS EXAMINATION.

Questions by defense:

Q. ———?

A. ———.

Q. ———?

Prosecution: (*Insert objection.*)

Defense: (*Insert reply, etc.*)

The law member (*or the president in the absence of the law member*) ruled (*insert here ruling in full*). (*See Appendix 9, Form I, pars. 2 and 3.*)

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[7] It is not necessary to ask every witness as to the serial number of the accused. But it should be established by the testimony of one witness, at least, who knows it.

[8] The record should set forth fully all the testimony introduced upon the trial, the oral portion as nearly as practicable in the precise words of the witness. If the court should decide to strike out any part, it will not be literally stricken out or omitted from the record, but will not be thereafter considered as part of the evidence.

(*If the ruling by the law member be upon any question other than the admissibility of evidence, so that under the provisions of A. W. 31, and of paragraphs 89 and 89a, M. C. M., it is subject to objection by a member of the court, and in such case any member objects to the ruling, the court will be closed and proceed to consider and vote upon the question.*) (*See A. W. 31; and par. 89a, M. C. M., and Appendix 9, Form I, par. 3.*)

(*If the ruling be by the president in the absence of the law member, the record will read:*)

"The president (*in the absence of the law member*) ruled (*insert here the ruling in full*)." (*See Appendix 9, Form I, par. 1.*)

(*If any member objects to any ruling by the president, the court will close to consider and vote on the question.*) (*A. W. 31, and par. 89, M. C. M.*)

(*Whenever the court closes to vote on any question, except on a challenge, on the findings, or on the sentence, upon opening the record will continue:*)

The court was closed, and upon being opened, the president, in the presence of the accused and his counsel, announced——

(*If the objection is not sustained the record will continue as in a case where there is no objection. If the objection is sustained there will be no further entry about the matter of that objection.*)

(*If the objection be by the defense or a member of the court the record will proceed in a corresponding way.*)

EXAMINATION BY THE COURT.

Q. ———?

A. ———.

(*If the court considers it necessary to hear the testimony of a witness read, or the witness desires to have any part of his testimony read for correction, the record will show that fact and the corrections, if any.*)

(*After the proper foundation for the introduction of a writing is laid, the record will continue:*)

Prosecution: "I offer in evidence the ——— (*describing the writing or other proposed exhibit*)."

Defense: (*Insert his reply.*) (*If there is no objection the record will continue:*)

The paper (*or other proposed exhibit*) was then received and read in evidence and marked exhibit ———.*

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* All documents and papers made part of the proceedings, or copies of them, will be securely fastened (*but not pasted*) to the record, in the order of their introduction, after the space left for the remarks of the reviewing authority, and marked "1," "2," "3," etc., so as to afford easy reference. Documents or other writings, or matter excluded by the court will not ordinarily be appended to the record, except documents excluded and marked for identification, but the record should simply specify the character of the writings and the grounds upon which they were ruled out.

(*If there is objection, the record will continue by stating any further remarks of the prosecution:*) (*Show ruling as outlined above.*)

(*If it is the defense that seeks to introduce the writing, the record will proceed in a corresponding manner, except that if the objection to the paper be sustained the defense counsel or counsel for the accused may, if he thinks the ruling of the court wrong, and considers it material to the rights of the accused that the paper should be brought to the attention of the reviewing authority, ask that the paper be marked for identification and appended to the record, in which case the paper will be marked with the initials of the trial judge advocate and appended to the record as a "paper marked for identification."*)

(*At the close of the prosecution, the record will continue:*)

"Prosecution: The prosecution rests."

(*If upon the close of the case for the prosecution or at any time therafter during the trial, before the close of the evidence the court should under the provisions of par. 158c, M. C. M., consider whether the evidence, introduced by the prosecution, or before the court, is legally sufficient to support a finding of guilty either as to all of the specifications and charges before the court, or as to any particular one or more thereof, such question will be determined, in the first instance, by the law member of the court, if any, or if there be no law member of the court, then by the president, by his ruling in open court upon the question.*) (*Insert here ruling in full.*) (*A. W. 31.*)

(*If, however, in such a case, any member of the court objects to such ruling, the court will close and vote by secret written ballot on the question.*) (*A. W. 31, and par. 158c, M. C. M.*)

(*If the court should so determine that the evidence then before the court in favor of the prosecution is not legally sufficient to sustain the specifications and charges, or any particular one or more thereof, then, in any such case, the court will forthwith direct and the president will on the opening of the court announce in open court a finding of not guilty, either of all the specifications and charges, or of such particular specification and charges, if any, as the court shall so find not to be supported by legally sufficient evidence.*)

(*If the court adjourns to meet another day, the record should continue:*)

"The court then, at ——— o'clock —. m., on ———, 19—, adjourned to meet at ——— o'clock —. m., on ———.

———— ————,

Captain, 5th Cavalry, Trial Judge Advocate.

Fort, ———, ———, 19—.

The court met, pursuant to adjournment, at ——— o'clock —. m.

Present:

All the members of the court, the trial judge advocate, the assistant trial judge advocate, the defense counsel and the assistant defense counsel.

(*The record also should show the names of all absentees, if any—including those absent at preceding sessions; the cause of absence of each absent member shall appear in the record.*)

The accused, his individual counsel (*if any*), and the reporter were also present.

(*If the proceedings of the previous day are required to be read, that fact will be recorded in the following form:*)

The proceedings of ——— were read and approved *or* corrected, as follows: (Date.)

(*In the latter case enumerate corrections for insertion in the record at this point, giving page and line on which they occur; and then indicate them in their proper places on the face of the record, the trial judge advocate initialing each place.*)

(*Insert at this point the opening statement of the defense counsel or counsel for the accused in full.*)

Corpl. John Smith, Company ———, ——— Infantry, a witness for the defense, was sworn and testified as follows:

QUESTION BY THE TRIAL JUDGE ADVOCATE.

Q. Do you know the accused? If so, state who he is.

A. I do; Private ———.

QUESTIONS BY THE DEFENSE.

Q. ———?

A. ———.

(*The succeeding questions of the defense and their answers should follow in order.*)

CROSS-EXAMINATION.

Questions by prosecution:

Q. ———?

A. ———.

REDIRECT EXAMINATION.

Questions by defense:

Q. ———?

A. ———.

(*Should the accused testify in his own behalf the record will continue:*)

EXAMINATION OF THE ACCUSED.

The accused, at his own request, was sworn and testified as follows:

Questions by defense:

Q. ———?

A. ———.

CROSS-EXAMINATION.

Questions by prosecution:

Q. ———?

A. ———.

REDIRECT EXAMINATION.

Questions by defense:

Q. ———?

A. ———.

(*Should the accused make an unsworn oral statement, it will be inserted in full.*)

(*If the accused does not testify or make any statement in his own behalf, the record will show at this point the explanation of his rights and the questions asked him by the law member* (*or, in the absence of the law member, the president*) *as required by par. 215, M. C. M., and his answers thereto.*) (*See Appendix 9, Form IV.*)

(*If the defense offers no other witness, the record should continue:*)

The defense had no further testimony to offer and no statement to make *or* having no further testimony to offer, made the following oral statement.

Or, having no further testimony to offer, submitted a written statement, which was read to the court, and is hereto appended and marked ———.[10]

Or, requested until ——— o'clock —. m., to prepare his defense.

(*If the court takes a recess during the time asked for, the record will continue:*)

The court then took a recess until ——— o'clock —. m., at which hour the members of the court, the trial judge advocate, the assistant trial judge advocate, the defense counsel, the assistant defense counsel, the accused, his individual counsel (*if any*), and the reporter resumed their seats.

(*Or, if the court has other business before it, the record may continue:*)

The court then proceeded to other business, and at ——— o'clock —. m. resumed the trial of this case, at which hour, etc.

Defense: (*Insert statement.*)

Or, the defense read to the court a statement, which is hereto appended and marked ———.

The prosecution: (*Insert statement.*)

Or, the prosecution read to the court a statement, which is hereto appended and marked ———.

The court was closed, and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty (*if any*), finds the accused:

[10] The statement of the accused, or argument in his defense, and all pleas to the jurisdiction, in bar of trial, or in abatement, when in writing, should be signed by the accused himself, referred to in proceedings as having been submitted by him, and appended to the record.

Of the Specification, Charge I: Guilty *or* Not guilty.

Of Charge I: Guilty *or* Not guilty.

Of Specification 1, Charge II: Guilty, except the words "———," substituting therefor the words "———"; of the excepted words, "Not guilty" and of the substituted words "Guilty."

Of Specification 2, Charge II: Guilty *or* Not guilty.

Of Charge II: Guilty *or* Not guilty; or Not guilty, but guilty of violation of the ——— Article of War.

(*If the accused is found not guilty upon all specifications and charges, the record will continue:*)

The court was opened, and, in the presence of the accused and his counsel, the president announced in open court that the accused was acquitted upon all specifications and charges.

(*In case of a finding of guilty upon a specification charging an offense for which the death penalty is made mandatory by law, or upon the charge under which such specification is laid, the record will show at this point that all the members of the court present at the time the vote was taken concurred therein.*)

(*If the accused is found guilty, the record should continue:*)

The court was opened and the trial judge advocate stated, in the presence of the accused and his counsel, that he had no evidence of previous convictions to submit.

Or, read the evidence of ——— previous convictions[11] (copies of which are hereto appended and marked "4," "5," etc), *or* (the accused having first stated that he did not object to the fairness or correctness of the summaries, from the service record of the accused, synopses of ——— previous convictions, as follows: ———), and thereupon asked the accused whether the evidence of such previous convictions was correct, and whether he had any statement to make in explanation or extenuation thereof, or in relation thereto, to which the accused answered ———.

Thereupon the trial judge advocate read to the accused the statement of accused's service, as shown on the charge sheet, and asked him whether it was correct, and whether he had any statement or correction to make concerning it, to which the accused answered ———.

The court was closed, and upon secret written ballot sentences the accused to ——— (⅔ *or* ¾ *or all*) of the members present at the time the vote was taken, concurring. *See A. W. 43, and pars. 294 and 308, M. C. M.*)

The court was opened, and in the presence of the accused and his counsel the president announced the findings and sentence in open court.[12]

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[11] For form of evidence of previous conviction, see par. 306, M. C. M.

[12] To be omitted in those rare cases where under the provisions of par. 332a, M. C. M., the court directs that the sentence be not announced in open court.

The court then, at —. m., proceeded to other business.
Or, adjourned until —. m., the ——— instant.
Or, adjourned to meet at the call of the president.

——— ———,
Colonel, 5th Cavalry, President.

——— ———,
Captain, 5th Cavalry,[13] *Trial Judge Advocate.*[14]

(*At least two blank sheets will be inserted after the authentication and before the exhibits for the decision and orders of the reviewing authority.*)

BINDING AND BRIEF.

(The papers forming the complete record, together with those required to be appended thereto (see clause 56 of subpar. (*b*), par. 357, M. C. M.), will be securely bound together at the top, leaving a margin of at least 2½ inches at the top of each page (easily removed clips or paper fasteners will not be used) and briefed on the back, as follows:

Private ——— ———, A. S. No. ———

Company ———, ——— Infantry.

Trial by General Court-Martial.

FORM FOR REVISION OF RECORD.[15]

Fort ——— ———,
——— ———, 19—.

The court reconvened at ——— o'clock —. m., pursuant to the following indorsement:

(*Insert copy of indorsement.*)

PRESENT.[16]

Col. ———, 5th Cavalry.
Lieut. Col. ———, 1st Infantry.

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[13] In case of the death, disability, or absence of the president or the trial judge advocate, see A. W. 33 and par. 357b, M. C. M. When the record is completed the trial judge advocate will forward it without delay to the appointing authority.

[14] In those rare cases in which, under par. 332a, M. C. M., the court has directed that the sentence be not announced in open court, if the trial judge advocate records the findings and sentence by the use of a typewriter medium, he will certify immediately after the authentication of the record as follows: "I certify that I recorded the findings and sentence of the court."

[15] See "Record of revision," par. 357, supra. The court is usually reconvened by indorsement on the charges returning them to the president of the court with the directions of the appointing authority.

[16] The record should show the name of each member of the court present during the proceedings in revision. Care must be taken that no member of the detail for the court is present except those who were present at the former proceedings and voting on the original findings and sentence.

Lieut. Col. ———, 3d Field Artillery.
Maj. ———, J. A. G. D., law member.
Maj. ———, 3d Field Artillery.
Capt. ———, 5th Cavalry.
Capt. ———, 5th Cavalry, trial judge advocate.
First Lieut. ———, 3d Field Artillery, assistant trial judge advocate.
Capt. ———, 4th Infantry, defense counsel.
Capt. ———, 4th Infantry, assistant defense counsel.

ABSENT.

Capt. ———, 1st Infantry (detached service).
Capt. ———, 3d Field Artillery (leave of absence).
Capt. ———, 4th Infantry (did not participate in findings or sentence).

(*Insert names of absentees and state cause of absence, if known.*)

The trial judge advocate read to the court the foregoing indorsement of the convening authority.[17]

The court was closed and revokes its former findings and sentence, and by secret written ballot, two-thirds of the members present at the time the vote was taken concurring in the findings of guilty (*if any*), finds the accused, etc.

Or, revokes its former sentence and by secret written ballot, etc., sentences the accused, etc. (*See A. W. 40, and pars. 352 and 364, M. C. M.*)

(*See A. W. 40, and pars. 352 and 364, M. C. M.*)

Or, amends the record by, etc.

The trial judge advocate and assistant trial judge advocate and the defense counsel and assistant defense counsel were then recalled and the court at ——— o'clock —. m., etc.

——— ———,
Colonel, 5th Cavalry, President.

——— ———,
Captain, 5th Cavalry, Trial Judge Advocate.

(The record of revision will be appended to the original proceedings, following them immediately, before the exhibits, and will be returned to the appointing authority.)

[17] The trial judge advocate will also read any other indorsements that may be connected with the proceedings in revision.

APPENDIX 11.

FORM FOR RECORD OF TRIAL BY SPECIAL COURT-MARTIAL.

Proceedings of a special court-martial which convened at ———, pursuant to the following order:

(*Here insert a literal copy of the order appointing the court and, following it, copies of any orders modifying the detail.*)

FORT ——— ———,
——— ———, 19—.

The court met pursuant to the foregoing order at ——— o'clock —. m.

PRESENT.[1]

Maj. ———, 5th Cavalry.
Capt. ———, 1st Field Artillery.
Capt. ———, Medical Corps.
First Lieut. ———, 10th Infantry.
First Lieut. ———, 5th Cavalry.
First Lieut. ———, 29th Cavalry, trial judge advocate.
First Lieut. ———, 1st Field Artillery, defense counsel.

ABSENT.[2]

Capt. ———, Coast Artillery Corps.

The court proceeded to the trial of Private[3] ———, Company ———, ——— Infantry, who[4] (on appearing before the court introduced ——— as his individual counsel) (was defended by the defense counsel).

(——— was sworn as reporter.)[5]

(Capt. ———, because ineligible, (being the accuser) (a witness for the prosecution) (———) was excused and withdrew.)

(First Lieut. ——— was, upon (peremptory) challenge,[6] excused and withdrew.)

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[1] In the record of the proceedings of a court-martial at its organization for the trial of a case the officers detailed as members and as trial judge advocate and defense counsel will be noted by name as present or absent.

[2] Statement of neither reason nor authority for the absence is required.

[3] Insert name and Army serial number.

[4] Words inclosed in parentheses will in a proper case be omitted.

[5] When authorized by the appointing authority, a stenographic reporter may be employed for a special court-martial, to be paid at the rates fixed in par. 113. (See par. 112, M. C. M.)

[6] Upon a challenge the record will set out in full the proceedings had thereon, including all testimony taken and statements made relative thereto, as well as the disposition thereof made by the court.

The accused stated that he had no objection to trial by any member (remaining) present.

The members of the court and the trial judge advocate were sworn.

The accused was arraigned upon the following charges and specifications:

CHARGE I: Violation of the ——— Article of War.

Specification: In that, etc.

CHARGE II: Violation of the ——— Article of War.

Specification 1: In that, etc.

Specification 2: In that, etc

——— ———,

Captain, ——— *Infantry.*

AFFIDAVIT.

(*See form, Appendix 10; page 619, supra.*)

(*Insert here also a copy of the order referring the case for trial.*)

PLEAS.

To all the specifications and charges: ———.

To the Specification, Charge I: ———.

To Charge I: ———.

To Specification 1, Charge II: ———.

To Specification 2, Charge II: ———.

To Charge II: ———.

The following-named witnesses were sworn and testified:

(*If a reporter has been authorized, or the testimony ordered reduced to writing, the record will be prepared in the same way as the record of a general court-martial.* (*See Appendix 10.*) *Otherwise the record may be in substantially the following form:*)

Sergt. ———, ——— Infantry. (*Here insert brief written summary of the testimony of the witness.*)

Corpl. ———, ——— Infantry. (*Here insert brief written summary of the testimony of the witness.*)

Pvt. ———, ——— Infantry. (*Here insert brief written summary of the testimony of the witness.*)

(*In case of any question to which objection is made such question will be inserted at length and the action of the court thereon, whether sustaining or overruling the objection; and, if the question be answered, the answer of the witness, thereto; see par. 358 (b), M. C. M. In such case the ruling will be by the president in the form shown in Appendix 9. The record may be in substantially the same form as in the case of an objection to questions in a general court-martial. See form, Appendix 10.*)

The defense was given full opportunity to examine each witness.

(The depositions of the following-named persons were received in evidence and are hereto appended, marked ———, ———, ———.)

The accused (at his own request was sworn and testified) (made an oral statement to the court, in substance as follows: *here inserting summary of the accused's statement*) (submitted a statement in writing, which is hereto appended, marked ———.)

(The rights of the accused as a witness were explained to him, as required by par. 215, M. C. M., in the form prescribed in Appendix 9.)[7]

The accused stated that he had nothing further to offer.

(An argument was made by counsel on behalf of the accused, in substance as follows:)

(The trial judge advocate made an argument in substance as follows:)

(A written argument was submitted on behalf of the accused, and is hereto appended, marked ———.)

The court was closed, and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty (*if any*) finds the accused.[8]

Of all specifications and charges: ———.[9]

Of the Specifications, Charge I: ———.

Of Charge I: ———.

Of Specification 1, Charge II: ———.

Of Specification 2, Charge II: ———.

Of Charge II: ———.

The court was opened and the president in open court in the presence of the accused and his counsel announced that the court (acquits the accused on all specifications and charges) *or* (will receive evidence of previous convictions of the accused, if any. *In the latter case, the record will continue in form similar to that of a general court-martial, Appendix 10*).

The court then, at ——— o'clock —. m. (proceeded to other business) (adjourned).[10]

———— ————,
Major, —— Infantry, President.

———— ————,
First Lieutenant, —— Infantry, Judge Advocate.

Approved, ———, 19—.

———— ————,
Colonel, —— Infantry, Commanding.

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[7] In a case where a stenographic reporter is employed or the evidence is ordered recorded, the explanation of the president and the reply of the accused thereto will appear in full in the record of trial. (See par. 215, M. C. M., and form Appendix 10.)

[8] See A. W. 43, and par. 294, M. C. M.

[9] For action when the accused pleads guilty in whole or in part, see par. 154 (*d*), M. C. M.

[10] One copy only of the record will be prepared, except in cases where the testimony is ordered recorded, when a carbon copy will be prepared and delivered to the accused, upon his request, in the same manner prescribed in the case of a general court-martial. (See pars. 117, 357 (*b*), clause 3, and 359, M. C. M.)

APPENDIX 12.

FORM FOR RECORD OF TRIAL BY SUMMARY COURT.

Complete the original charge sheet (see form, Appendix 5) upon which is indorsed the original order of reference for trial, as the record of trial by summary court. (See pars. 79 (*a*) and 363, M. C. M.)

(The indicated spaces on the third page of the charge sheet will be utilized by the summary court for pleas, findings, and sentence. The form may be substantially as follows:)

Findings:[1] *(If the findings as to all the specifications and charges are the same, a single proper entry, such as "Guilty," or "Not guilty," will be made.*[2] *If necessary,*[3] *however, in order to show the facts, detailed entries will be made.)*

Sentence:[4] ——.

——— ———,

Captain, —— Infantry, Summary Court.

Approved, —— ——, 19—.

——— ———,

Colonel, —— Infantry, Commanding.

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[1] If a special plea is made the record will set out in full the proceedings had thereon including the substance of all testimony and statements made relative thereto, as well as the disposition made thereof by the court.

[2] For action in case the accused does not testify or make any statement in his own behalf, see par. 215, M. C. M., and Form IV, Appendix 9.

[3] In case the accused is a noncommissioned officer (i. e., a corporal, see Appendix 21), he will be asked, at the outset of the trial, whether he objects to trial by summary court-martial; and the fact of his being so asked, and his answer to the question, will be written down in the record of trial, and also in the report of trial. (See "note" to par. 43(k), M. C. M.)

[4] For action in case accused pleads guilty, see par. 351 (d), M. C. M., and Form III, Appendix 9.

APPENDIX 13.

FORMS OF SENTENCES.

(For forms for action by reviewing authority on sentences by courts-martial, see Appendix 15.)

A sentence adjudged by a court-martial will, in a proper case, be expressed substantially in one or another of the forms following. When desirable, in a proper case, two or more of the forms may be combined.

1. To have his pay for ——— days detained.
2. To have two-thirds (*or other fraction*) of his pay per month for ——— months detained.
3. To forfeit ——— days' pay.
4. To forfeit two-thirds (*or other fraction*) of his pay per month for ——— months.
5. To perform hard labor for ——— days (*or* months).
6. To be confined at hard labor for ——— days (*or* months).
7. To be confined at hard labor, at such place as the reviewing authority may direct, for ——— days (*or* months *or* years).
8. To be confined at hard labor, at such place as the reviewing authority may direct, for ——— months and to forfeit two-thirds (*or other fraction*) of his pay per month for a like period.
9. To be dishonorably discharged the service and to forfeit all pay and allowances due or to become due.
10. To be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ——— days (*or* months *or* years).
11. To be reduced to the grade of private.
12. To be deprived of all rights and privileges arising from his certificate of eligibility to promotion.
13. To be admonished.
14. To be reprimanded.
15. To be restricted to the limits of his post (*or other place*) for ——— months.
16. To be suspended from duty for ——— months.
17. To be suspended from command for ——— month
18. To be suspended from rank for ——— months.
19. To be reduced in rank ——— files.
20. To be reduced in rank so that his name shall appear in the lineal list of officers next below that of ———.

21. To be dismissed the service and to forfeit all pay and allowances due or to become due.

22. To pay to the United States a fine of ——— dollars and to be confined at hard labor, at such place as the reviewing authority may direct, until said fine is so paid, but for not more than ——— months (*or* years).

23. To pay to the United States a fine of ——— dollars, to be confined at hard labor, at such place as the reviewing authority may direct, for ——— months (*or* years), and to be further confined at hard labor until said fine is so paid, but for not more than ——— months (*or* years), in addition to the ——— months (*or* years) hereinbefore adjudged.

24. To be dishonorably discharged the service of the United States, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life.

25. To be shot to death with musketry.

26. To be hanged by the neck until dead.

APPENDIX 14.

FORMS FOR SYNOPSES OF SENTENCES.

[For Entry in Service Record.]

INSTRUCTIONS.

(*See also "Instructions," Appendix 7.*)

The forms for recording the synopses of sentences adjudged by court-martial, as set forth below, constitute a *general guide for use in entering the sentences on the service record*, the entries being made in the following sequence in each case:

(*a*) Sentence as approved; (*b*) date of approval of sentence.

(These forms cover the forms for sentences given in Appendix 13.)

1. Pay for 10 days detained, ———/18.
2. ⅔ pay for mo. for 2 mos. detained, ———/18.
3. Forfeit 10 days' pay, ———/18.
4. Forfeit ⅔ pay per mo. for 2 mos., ———/18.
5. Hard labor for 5 days, ———/18.
6. Confmt. 10 days, ———/18.
7. Confmt. 2 mos., ———/18.
8. Confmt. 2 mos. Forfeit ⅔ pay for like period.
9. Dishon. disch., ———/18.
10. Dishon. disch. conf. 6 mos., ———/18.
11. Reduced, ———/18.
12. Loss of privileges of certificate of eligibility, ———/18.

13 and 14 omitted; refer to officers only.

15. Restricted to limits of post for 6 mos., ———/18.

16 to 24 omitted; refer to officers only.

25. To be shot, ———/18.
26. To be hanged, ———/18.

APPENDIX 15.

FORMS FOR ACTION BY REVIEWING AUTHORITY.

[For forms for sentences see Appendix 13.]

The following forms will serve as a general guide for reviewing authorities in recording, in cases in which such forms are appropriate, their action on sentences imposed by courts-martial. In a proper case the substance of two or more of the forms may be combined. Likewise, the action as recorded may contain proper matter additional to that set out in any of the several forms.

A. FORMS FOR ORIGINAL ACTION.

1 Approved and ordered executed (*or* disapproved) ———, 192—.

———— ————,
Colonel, ——— *Infantry, Commanding.*

2 Headquarters ———, ———, 192—.
Approved and ordered executed (*or* disapproved).

———— ————,
Colonel, ——— *Infantry, Commanding.*

3 Approved and suspended ———, 192—.

———— ————,
Colonel, ——— *Infantry, Commanding.*

4 Approved and ordered executed, but forfeiture (*or* confinement) suspended, ———, 192—.

———— ————,
Colonel, ——— *Infantry, Commanding.*

5 Headquarters ———, ———, 192—.
In the foregoing case of ———, the sentence is approved and will be duly executed (*or* is disapproved).

———— ————,
Colonel, ——— *Infantry, Commanding.*

6 Headquarters ———, ———, 192—.
In the foregoing case of ——— the sentence is approved, but owing to the length of time the accused has been in confinement ——— days (*or* months) of the confinement imposed are remitted. As thus modified the sentence will be duly executed.

———— ————,
Colonel, ——— *Infantry, Commanding.*

7 Headquarters ———, ———, 192—.

In the foregoing case of ——— the findings of Specifications 1 and 2, Charge II, are disapproved. The sentence is approved and will be duly executed.

———— ————,
Colonel, ——— Infantry, Commanding.

8 Headquarters ———, ———, 192—.

In the foregoing case of ——— only so much of the findings of guilty of the specification of Charge I and of Charge I as involves a finding of guilty of absence without leave from ——— to ———, terminated by apprehension (*or* surrender) is approved. Only so much of the sentence as provides for ——— is approved and will be duly executed.

———— ————,
Colonel, ——— Infantry, Commanding.

9 Headquarters ———, ———, 192—.

In the foregoing case of ——— the sentence is approved, but the execution thereof is suspended.

———— ————,
Colonel, ——— Infantry, Commanding.

10 Headquarters ———, ———, 192—.

In the foregoing case of ——— the sentence is approved, but the execution thereof, in so far as it relates to forfeiture of pay (*or* to confinement) is suspended.

———— ————,
Colonel, ——— Infantry, Commanding.

11 Headquarters ———, ———, 192—.

In the foregoing case of ——— the sentence is approved and will be duly executed, but the execution of that portion thereof adjudging dishonorable discharge is suspended until the soldier's release from confinement. ——— is designated as the place of confinement.

———— ————,
——— *General, Commanding.*

12 Headquarters ———, ———, 192—.

In the foregoing case of ——— the sentence is approved and will be duly executed. ——— is designated as the place of confinement.

———— ————,
——— *General, Commanding.*

13 Headquarters ———, ———, 192—.

In the foregoing case of ——— it appears from the record of trial that the officer who had subscribed the charges participated as a member of the court in the findings and sentence. As such officer is *prima facie* the accuser in the case, and as the record of trial contains noth-

ing to indicate that the court upon investigation arrived at a finding that he was not in fact such accuser, the proceedings are, in view of the provisions of the ——— article of war, invalid.

———,
——— *General, Commanding.*

14 Headquarters ———, ———, 192—.

In the foregoing case of ——— it appears from the record of trial that an officer who testified as a witness for the prosecution participated as a member of the court in the findings and sentence. In view of the provisions of the ——— article of war the proceedings are invalid.

———,
——— *General, Commanding.*

15 Headquarters ———, ———, 192—.

To ——— ———.

In the foregoing case of ——— the sentence is approved and the record of trial is forwarded for action under the forty-eighth article of war.

———,
——— *General, Commanding.*

16 Headquarters ———, ———, 192—.

To the Judge Advocate General of the Army.

In the foregoing case of ——— the sentence is approved, but the execution thereof is suspended until the pleasure of the President be known, and the record of trial is forwarded for action under the fifty-first article of war.

———,
——— *General, Commanding.*

17 Headquarters ———, ———, 192—.

In the foregoing case of ——— the sentence is approved and will be duly executed at ——— on ———, 192—, under the direction of the commanding ———.

———,
——— *General, Commanding.*

18 Headquarters ———, ———, 192—.

In the foregoing case of ——— the sentence is confirmed and will be duly executed at ——— on ———, 192—, under the direction of the commanding ———.

———,
——— *General, Commanding.*

19 Headquarters ———, ———, 192—.

In the foregoing case of ——— the sentence is approved (*or* confirmed) (but the period of confinement is reduced to ———). The

——— is designated as the place of confinement. Pursuant to the provisions of Article of War 50½ applying to this case, the execution of the sentence will not be ordered until the Board of Review and the Judge Advocate General shall have passed upon the legal sufficiency of the record to support the sentence.

———— ————,
——— *General, Commanding.*

B. FORMS FOR ORDERS VACATING SUSPENSIONS.

1 Headquarters ———, ———, 192—.

So much of the order published in ——— Court-Martial Order No. —, ———, 192—, these headquarters, ———, 192— (*or* found in a record of trial by summary court approved ———, 192—), as suspends execution of sentence in the case of ——— is vacated and said sentence will be carried into execution.

By order of Col. ———:

———— ————,
Adjutant.

2 Headquarters ———, ———, 192—.

So much of the order published in ——— Court-Martial Order No. —, ———, 192—, these headquarters, ———, 192— (*or* found in a record of trial by summary court approved ———, 192—), as suspends execution of sentence to confinement (*or* forfeiture of pay) in the case of ——— is vacated, and that part of said sentence will be carried into execution.

By order of Col. ———:

———— ————,
Adjutant.

3 Headquarters ———, ———, 192—.

So much of the order published in General Court-Martial Order No. —, ———, 192—, these headquarters, as suspends execution of sentence to dishonorable discharge in the case of ——— is vacated, and that part of said sentence will be carried into execution.

By order of Col. ———:

———— ————,
Adjutant.

APPENDIX 16.

COURT-MARTIAL ORDERS.

A. FORM FOR GENERAL COURT-MARTIAL ORDER.

GENERAL COURT-MARTIAL ORDER No. 447. } HEADQUARTERS EASTERN DEPARTMENT, *Governors Island, N. Y., July 27, 1919.*

Before a general court-martial which convened at Fort Hamilton, N. Y., pursuant to paragraph 6, Special Orders, No. 93, Headquarters Eastern Department, April 24, 1919,[1] as modified by paragraph 7, Special Orders, No. 101, Headquarters Eastern Department, May 26, 1919, was arraigned and tried:

Private John Doe, 1,682,364, Company F, 29th Infantry.

CHARGE I: Violation of the 58th Article of War.

Specification: In that Private John Doe, Company F, 29th Infantry, did at Fort Jay, N. Y., on or about March 27, 1917, desert the service of the United States and did remain absent in desertion until he was apprehended at Brooklyn, N. Y., on or about June 30, 1919.

CHARGE II: Violation of the 84th Article of War.

Specification: In that Private John Doe, Company F, 29th Infantry, did at Fort Jay, N. Y., on or about March 27, 1917, through neglect, lose one overcoat, olive drab, value $14.84, and one blanket, light weight, value $3.79, issued for use in the military service.

PLEAS.

To the specification, Charge I: "Not guilty."
To Charge I: "Not guilty."
To the specification, Charge II: "Not guilty."
To Charge II: "Not guilty."
Or
To all the specifications and charges: "Not guilty."[2]

FINDINGS.

Of the specification, Charge I: "Guilty."[2]
Of Charge I: "Guilty."
Of the specification, Charge II: "Guilty."
Of Charge II: "Guilty."
Or
Of all the specifications and charges: "Guilty."[2]

---

[1] The orders appointing the court and all orders modifying the convening order will be cited.

[2] Where the accused pleads guilty or not guilty to all the specifications, or is found guilty or not guilty of all, the form may be abbreviated as indicated.

[3] If a special plea has been made *and sustained by the court,* the wording will be: "Plea in ——— (———) sustained by the court."

SENTENCE.

To be dishonorably discharged the service; to forfeit all pay and allowances due, or to become due; and to be confined at hard labor at such place as the reviewing authority may direct for two years. (Four previous convictions considered.)

The sentence was adjudged on ———, 19—.

The sentence is approved and will be duly executed.

(*In cases where Article of War 50½ requires that before execution of the sentence is ordered the record of trial be reviewed by the Board of Review and the Judge Advocate General:*) The record of trial having been reviewed by the Board of Review and the Judge Advocate General, as required by Article of War 50½, and held legally* sufficient to support the findings and sentence, the sentence is approved and will be duly executed); *or*, from asterisk (*insufficient to support so much of the sentence as is in excess of* ——— (reciting the holding, as the case may be), *so much of the sentence is approved as does not exceed* ———. *As thus modified the sentence will be duly executed.*)

The United States Disciplinary Barracks is designated as the place of confinement.

By command of ——— ———.

Colonel, General Staff, Chief of Staff.

Official.

———,

Adjutant General, Adjutant.

B. FORM FOR SPECIAL COURT-MARTIAL ORDER.

SPECIAL COURT-MARTIAL ORDER No. 43. } HEADQUARTERS FORT JAY, N. Y., *July 27, 1919.*

Before a special court-martial which convened at Fort Jay, N. Y., pursuant to paragraph 6, Special Orders, No. 93, these headquarters, April 24, 1919, as modified by paragraph 7, Special Orders, No. 101, these headquarters, May 26, 1919, was arraigned and tried:

Private John Doe, Company F, 29th Infantry.

CHARGE I: Violation of the 58th Article of War.

Specification: In that Private John Doe, Company F, 29th Infantry, did at Fort Jay, N. Y., on or about March 27, 1917, desert the service of the United States and did remain absent in desertion until he was apprehended at Brooklyn, N. Y., on or about June 30, 1919.

CHARGE II: Violation of the 84th Article of War.

Specification: In that Private John Doe, Company F, 29th Infantry, did at Fort Jay, N. Y., on or about March 27, 1917, through neglect, lose one overcoat, olive drab, value $14.84, and one blanket, light weight, value $3.29, issued for use in the military service.

* Where the accused pleads guilty or not guilty to all the specifications or is found guilty or not guilty of all, the form may be abbreviated as indicated.

PLEAS.

To the specification, Charge I: "Not guilty."
To Charge I: "Not guilty."
To the specification, Charge II: "Not guilty."
To Charge II: "Not guilty."
Or
To all the specifications and charges: "Not guilty."[2]

FINDINGS.

Of the specification, Charge I: "Guilty."[3]
Of Charge I: "Guilty."
Of the specification, Charge II: "Guilty."
Of Charge II: "Guilty."
Or
Of all the specifications and charges: "Guilty."[2]

SENTENCE.

To be confined at hard labor for six months and to forfeit two-thirds of his pay per month for a like period. (Two previous convictions considered.)

The sentence is approved.

By order of ——— ———.

———— ————,
Adjutant.

Official:

——— ———,
Adjutant.

---

[2] Where the accused pleads guilty or not guilty to all the specifications, or is found guilty or not guilty of all, the form may be abbreviated as indicated.

[3] If a special plea has been made *and sustained by the court,* the wording will be: "Plea in ——— (———) sustained by the court."

APPENDIX 17.

INTERROGATORIES AND DEPOSITION.

To be read in evidence before a[1] ———, United States Army, appointed to meet at ———, by paragraph —, Special Orders, No. —, Headquarters ———, ———, 191—, in the case of (in the matter of)[2] ———.

———, ———, 191—.

To ——— ———:

Please cause to be taken (*on the interrogatories herein contained*[7]) the deposition of ———, to be found at ———.

——— ———,[3]

HEADQUARTERS, ———, *191*—.

To ——— ———,

who will take *or* cause to be taken[4] the deposition of the person named above (*on the interrogatories*[7] *herein contained*).[5]

By ——— of ———:

——— ———,
Adjutant.

———

First interrogatory:[7] Are you in the military service of the United States? If so, what is your full name, rank, organization, and station? If not, what is your full name, occupation, and residence?

Answer:[6] ———.

Second interrogatory: ———.

Answer: ———.

First cross-interrogatory: ———.

Answer: ———.

First interrogatory by the ———:

Answer: ———.

(Witness sign here) ——— ———.

---

[1] General (*or* special *or* summary) court-martial, *or* military commission, *or* court of inquiry, *or* military board.

[2] Name, rank, and organization of the accused, or other proper words identifying the particular matter in which the deposition is desired to be used.

[3] To be subscribed by the trial judge advocate or other proper person with his name, rank, organization, and official title, as "trial judge advocate," "summary court," "recorder," etc.

[4] Strike out word or words not used.

[5] If it is desired to give special instructions, or if a travel order is necessary, the remaining space will be used for the purpose.

[6] If the spaces for answers are not sufficient, extra sheets may be inserted by the officer taking the deposition. In such case he will rewrite the interrogatories, writing the answers immediately below the respective interrogatories.

[7] If the deposition is to be taken on oral interrogatories (see pars. 174a and 181½. M. C. M.), this form will be changed accordingly.

I certify that the above deposition was duly taken by me, and that the above-named witness, having been first duly sworn by me, gave the foregoing answers to the several interrogatories, and that he subscribed the foregoing deposition in my presence at ———, this ——— day of ———, 191—.

(Name) ——— ———,

(Rank and organization) ——— ———.

(Official character, as "summary court," "officer designated to take the deposition," "notary public," etc.)

——— ———.

[Back.]

INSTRUCTIONS.

1. Interrogatories, how submitted.—(*a*) The party desiring the deposition submits to the opposite party the interrogatories which he wishes propounded to the person whose deposition he desires, and the opposite party then submits to him such cross-interrogatories, if any, as he may desire. Such additional direct and cross-interrogatories may be submitted as desired; or

(*b*) The party desiring the deposition submits to the court, military commission, or board the interrogatories which he wishes propounded to the person whose deposition he desires. The opposite party then submits to the court, military commission, or board such cross-interrogatories, if any, as he may desire. The court, military commission, or board then submits such additional interrogatories as they may deem proper and desirable, and such additional direct and cross-interrogatories may be submitted as are desired; or

(*c*) Where the court, military commission, or board desires that the deposition of a particular person be obtained it will cause interrogatories to be prepared accordingly. The prosecution and defense (or other party or parties in interest) then submit such interrogatories as they may desire. Such additional interrogatories may be included as are desired by the court, military commission, or board, or by a party in interest. (M. C. M., par. 176.)

2. Procedure to obtain deposition on written interrogatories.—(*a*) All the interrogatories to be propounded to the person are entered upon the form for interrogatories and deposition, and the trial judge advocate, summary court, or recorder will take appropriate steps to cause the desired deposition to be taken with the least practicable delay. In the ordinary case he will either send the interrogatories to the commanding officer of the post, recruiting station, or other military command, at or nearest which the person whose deposition is desired is stationed, resides, or is understood to be, or will send them to some other responsible person, preferably a person competent to administer

oaths, at or near the place at which the person whose deposition is desired is understood to be. In a proper case the interrogatories may be sent to the corps area or other superior commander, or to the witness himself, and in any case they will, when necessary, be accompanied by a proper explanatory letter.

(*b*) When interrogatories are received by a commanding officer he will either take or cause to be taken the deposition thereon. He may send an intelligent enlisted man—preferably a noncommissioned officer, if available—to the necessary place for the purpose of obtaining the deposition, or he may properly arrange by mail or otherwise that the deposition be taken. The deposition will be taken with the least practicable delay, and when taken will be sent at once direct to the trial judge advocate of the court-martial trying the case, or other proper person.

(*c*) If the witness whose deposition is desired is a civilian, the trial judge advocate, or other proper person sending interrogatories as above, will inclose with them a prepared voucher for the fees and mileage of the witness, leaving blank such spaces provided therein as it may be necessary to leave blank, accompanied by the required number of copies of the orders appointing the court, military commission, or board. The trial judge advocate, summary court, or recorder will also send with the interrogatories duplicate subpœna requiring the witness to appear in person at a time and place to be fixed by the officer, military or civil, who is to take the deposition. If the name of this officer is not known, the space provided for it will be left blank. If a military officer takes the deposition, he will complete the witness voucher, certify it, and transmit it to the nearest disbursing finance officer for payment. When the deposition is to be taken by a civil officer, he will be asked to obtain and furnish to the military officer requested or designated to cause the deposition to be taken the necessary data for the completion of the witness voucher, and the latter will complete the voucher, certify it, and transmit it to the nearest disbursing finance officer for payment. In the case of a military witness, a subpœna will not accompany the interrogatories, but the officer before whom the deposition is to be taken will take the necessary steps to have the witness appear at the proper time and place. (M. C. M., par. 177.)

3. Procedure to obtain deposition on oral interrogatories.—Follow the provisions of paragraph 181½, M. C. M.

4. Payment of civilian witnesses, etc.—(*a*) A civilian, not in Government employ, duly summoned to appear as a witness before a military court, commission or board, or at a place where his deposition is to be taken for use before such military court, commission or board, will receive $1.50 for each day of his actual attendance before such military court, commission or board, or for the purpose of having his deposition taken, and 5 cents a mile for going from his place of residence to the place of trial or of the taking of his deposition, and 5 cents a mile for returning, except as follows:

(1) In Porto Rico and Cuba he will receive $1.50 a day while in attendance as above stated, and 15 cents for each mile necessarily traveled over stage line or by private conveyance, and 10 cents for each mile over any railway or steamship line.

(2) In Alaska, east of the one hundred and forty-first degree of west longitude, he will receive $2 a day while in attendance as above stated, and 10 cents a mile; and west of said degree $4 a day and 15 cents a mile.

(3) In the States of Wyoming, Montana, Washington, Oregon, California, Nevada, Idaho, Colorado, Utah, New Mexico, and Arizona he will receive $5 a day for the time of actual attendance as above stated, and for the time necessarily occupied in going to and returning from the same, and 15 cents for each mile necessarily traveled over any stage line or by private conveyance, and 5 cents for each mile by any railway or steamship. (M. C. M., par. 185.)

(*b*) Civil officers before whom depositions are taken for use in the military service will be paid the fees allowed by the law of the place where the depositions are taken. (M. C. M., par. 181.)

5. Articles of War.

ART. 26. DEPOSITIONS—BEFORE WHOM TAKEN.—Depositions to be read in evidence before military courts, commissions, courts of inquiry, or military boards, or for other use in military administration, may be taken before and authenticated by any officer, military or civil, authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths.

ART. 114. AUTHORITY TO ADMINISTER OATHS.—Any judge advocate or acting judge advocate, the president of a general or special court-martial, any summary court-martial, the trial judge advocate or any assistant trial judge advocate of a general or special court-martial, the president or the recorder of a court of inquiry or of a military board, any officer designated to take a deposition, any officer detailed to conduct an investigation, and the adjutant of any command shall have power to administer oaths for the purposes of the administration of military justice and for other purposes of military administration; and in foreign places where the Army may be serving shall have the general powers of a notary public or of a consul of the United States in the administration of oaths, the execution and acknowledgment of legal instruments, the attestation of documents, and all other forms of notarial acts to be executed by persons subject to military law.

6. Taking depositions in foreign country.—If the evidence desired from a witness residing in a foreign country is necessary and material and is desired to be read before a court-martial, military commission, court of inquiry, or military board sitting within any of the States of the Union or the District of Columbia, interrogatories (accompanied by the necessary vouchers for fees and mileage) will ordinarily be forwarded through military channels to The Adjutant General of the Army. They will then be transmitted by the Secre-

tary of War to the Secretary of State with the request that they be sent to the proper consul of the United States and the deposition of the witness taken. In the case of troops serving along the international boundaries outside of the United States proper, or in foreign countries, the officer exercising general court-martial jurisdiction may, in his discretion, detail an officer to take the deposition of a civilian witness or he may send the interrogatories direct to the consul of the United States nearest the place of residence of the witness with the request that the deposition be taken. In the latter case the interrogatories will be accompanied by the proper vouchers for the fees and mileage of the witness. (M. C. M., par, 182.)

APPENDIX 18.

FORM OF REPORT OF INVESTIGATING OFFICER.

Under paragraph 76a, Manual for Courts-Martial.

Headquarters ——— ———
(Place:) ——— ———
(Date:) ———, 19—.

From: ——— ———
To: ——— ———
Subject: Inclosed charges.

1. I have investigated the inclosed charges, dated ———, 192—, against (*Private John Doe, Army Serial No. 235789, Machine Gun Troop, 2nd Cavalry*), in accordance with the provisions of paragraph 76a, Manual for Courts-Martial. I have, in the presence of the accused, examined all available witnesses and documentary evidence, and have reduced the material testimony given by each witness, on direct examination and on cross-examination, to a clear, succinct statement or summary which, in the presence of the accused, was read over to the witness and signed by the witness and sworn to by him before me.[1] Following is such summary of the material testimony given by each witness.[2]

Sergeant JAMES JONES, Machine Gun Troop, 2d Cavalry.

While on duty as stable sergeant, 12th May, 1920, about two o'clock, I told accused, Private Doe, then working on stable police, to put out the bedding hay.

About three o'clock that afternoon I missed accused. I searched for him, but could not find him; but found that two horses were gone from the corral, and two bridles were gone. I reported it to the first sergeant. They were cavalry horses, Government horses, issued to Machine Gun Troop, 2d Cavalry, for drill purposes; and were valued at $184.40 each.

CROSS-EXAMINATION.

I missed the horses about two o'clock or 2.30 in the afternoon, while I was looking for the accused. I did not see the accused take them. Horses sometimes get away from the troop; but I have never known one to get out of the corral.

——— ———

Sgt., Machine Gun Troop, 2d Cavalry.

[1] If any witness declines to sign or swear to his statement, that fact will be noted. If a witness desires the statement changed before signing it, it will be changed as desired.

[2] For action when it is not practicable to obtain personal testimony from a distant witness, see par. 76a, clause 8, M. C. M.

FORM OF REPORT OF INVESTIGATING OFFICER.

First Sergeant WILLIAM K. BLACK, Machine Gun Troop, 2d Cavalry.

I was on duty as first sergeant of the Machine Gun Troop on May 12, 1920. I put the accused on stable police that morning. (*Continue in the same form as with the other witness:*)

CROSS-EXAMINATION.

We knew the tracks were those of cavalry mounts by the marks of the horseshoes.

———— ————,
1st Sgt., Machine Gun Troop, 2d Cavalry.

Corporal ALBERT M. YOUNG, Machine Gun Troop, 2d Cavalry.

(*Same form as before.*)

NO CROSS-EXAMINATION.

The accused[3] having been carefully warned by me that it was not necessary for him to make any statement with reference to the charges against him, but that if he did make one it might be used against him, (*said that he did not desire to make a statement*) *or* (*made the following statement:*) ———— ————.

(*If such be the case:* "Appended is the report of examination of the accused in accordance with paragraph 76c, Manual for Courts-Martial, by Captain John Smith, Medical Corps.")

I have not examined any documentary evidence.

(*Or, if such be the case:* "The following documents have been examined and shown to the accused,[4] and (copies thereof) are appended.")

(*If neither the documents nor copies of them can be appended, then list them, and state where they can be found.*)[5]

Evidence of two previous convictions of the accused is appended.

Explanatory or extenuating circumstances: (*Here set out any such circumstances which have come to the attention of the investigating officer; see clause 10, par. 76a, M. C. M.*)

Disposition of the case which is recommended: ————.

———— ————,
Captain, 2d Cavalry,
Investigating Officer.[6]

[3] The accused will not be sworn. If he makes a statement it will be read over to him and he will be offered an opportunity to sign it if he so desires, but will not be required to do so, and will be advised that it is not necessary for him to do so. (See clause 8, par. 76a, M. C. M.)

[4] See clause 8, par. 76a, M. C. M.

[5] Bulky documents or official reports will ordinarily not be appended or copied, but listed and the place where they may be found stated.

[6] While this form may be used by the investigating officer, it is to be regarded as suggestive only, and not obligatory.

APPENDIX 19.

SUBPŒNA FOR CIVILIAN WITNESS.

The President of the United States to ——— ———, *greeting:*

You are hereby summoned and required to be and appear in person on the ——— day of ———, 191—, at ——— o'clock —. m.[1] before ———,[2] a ———,[3] designated to take your deposition to be read in evidence before a[4] ——— of the United States, at ———, appointed to meet by paragraph ———, Special Orders, No. ———, Headquarters ———, dated ———, 191—, then and there to testify and give evidence as a witness for the ——— in the case of[5] ———,[6] and you are hereby required to bring with you, to be used in evidence in said case, the following described documents, to wit: ———.

And have you then and there this precept.

Dated at ——— this ——— day of ———, 191—.

———— ————.

(To be subscribed by trial judge advocate, recorder, etc.)

The witness is requested to subscribe on one copy of the subpœna the following and to return to the person serving the subpœna the copy thereof so subscribed.

————— ————,

———, 191—.

I hereby accept service of the above subpœna.

———— ————.

Form No. 76, A. G. O. (Signature of witness.)

[Back.]

Personally appeared before me the undersigned authority, ———, who, being first duly sworn according to law, deposes and says that at ——— on ———, 191—, he personally delivered to ——— in person a duplicate of the within subpœna.

————— ————.

Subscribed and sworn to before me at ——— this ——— day of ———, 191—.

———— ————.

(Rank, organization, and official character.)

---

[1] Line out when inappropriate "before ———, a ——— designated to take your deposition to be read in evidence."

[2] When used, enter name, rank, and organization, if any.

[3] When used, enter official character, if any, such as trial judge advocate, summary court, notary public, etc.

[4] General (*or* special, *or* summary) court-martial, etc.

[5] Enter name, etc., of accused or other subject of investigation.

[6] Line out when inappropriate "and you are hereby required to bring with you, to be read in evidence in said case, the following described documents, to wit."

INSTRUCTIONS.

1. **Articles of war.**—(*a*) *Process to obtain witnesses.*—Every trial judge advocate of a general or special court-martial and every summary court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of the United States, having criminal jurisdiction, may lawfully issue; but such process shall run to any part of the United States, its Territories, and possessions. (A. W. 22.)

(*b*) *Refusal to appear or testify.*—Every person not subject to military law who, being duly subpœnaed to appear as a witness before any military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before such court, commission, court of inquiry, or board, willfully neglects or refuses to appear, or refuses to qualify as a witness, or to testify, or produce documentary evidence which such person may have been legally subpœnaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States or in a court of original criminal jurisdiction in any of the territorial possessions of the United States, jurisdiction being hereby conferred upon such courts for such purpose; and it shall be the duty of the United States district attorney or the officer prosecuting for the Government in any such court of original criminal jurisdiction, on the certification of the facts to him by the military court, commission, court of inquiry, or board, to file an information against and prosecute the person so offending, and the punishment of such person, on conviction, shall be a fine of not more than $500 or imprisonment not to exceed six months, or both, at the discretion of the court: *Provided*, That the fees of such witness and his mileage, at the rates allowed to witnesses attending the courts of the United States, shall be duly paid or tendered said witness, such amounts to be paid out of the appropriation for the compensation of witnesses; *Provided further*, That every person not subject to military law, who before any court-martial, military tribunal, or military board, or in connection with, or in relation to any proceedings or investigation before it or had under any of the provisions of this act, is guilty of any of the acts made punishable as offenses against public justice by any provision of chapter 6 of the act of March 4, 1909, entitled "An act to codify, revise, and amend the penal laws of the United States" (volume 35, United States Statutes at Large, page 1088), or any amendment thereof, shall be punished as therein provided. (A. W. 23.)

2. **Tender of fees preliminary to prosecution.**—In case a civilian witness is duly subpœnaed under the authority of A. W. 22 and willfully neglects or refuses to appear or refuses to qualify as a witness, or to testify or produce documentary evidence, which he may have been legally subpœnaed to produce, he will at once be tendered or

paid by the nearest finance officer one day's fees and mileage for the journeys to and from the court, and will thereupon be again called upon to comply with the requirements of the law. Upon failing the second time to comply with the requirements of the law, a complete report of the case will be made to the officer exercising general court-martial jurisdiction over the command with a view to presenting the facts to the Department of Justice for the punitive action contemplated in A. W. 23. (M. C. M. 172.)

3. Civilians not in Government employ.—A civilian not in Government employ, duly summoned to appear as a witness before a military court, commission, or board, or at a place where his deposition is to be taken for use before such court, commission, or board, will receive $1.50 for each day of his actual attendance before such court, commission, or board, or for the purpose of having his deposition taken, and 5 cents a mile for going from his place of residence to the place of trial or of the taking of his deposition, and 5 cents a mile for returning, except as follows:

(*a*) In Porto Rico and Cuba he will receive $1.50 a day while in attendance, as above stated, and 15 cents for each mile necessarily traveled over stage line or by private conveyance, and 10 cents for each mile over any railway or steamship line.

(*b*) In Alaska east of the one hundred and forty-first degree of west longitude he will receive $2 a day while in attendance as above stated and 10 cents a mile, and west of said degree $4 a day and 15 cents a mile.

(*c*) In the States of Wyoming, Montana, Washington, Oregon, California, Nevada, Idaho, Colorado, Utah, New Mexico, and Arizona, he will receive $5 a day for the time of actual attendance as above stated and for the time necessarily occupied in going to and returning from the same, and 15 cents for each mile necessarily traveled over any stage line or by private conveyance, and 5 cents for each mile by any railway or steamship. (M. C. M., par. 185.)

[NOTE.—1. Travel must be estimated by the shortest usually traveled route—by established lines of railroad, stage, or steamer—the time occupied to be determined by the official schedules, reasonable allowance being made for unavoidable detention.

2. These rates apply to the Philippine Islands. (See Cir. 45, A. G. O., 1902.)

3. A civilian not in Government employ, when furnished transportation on transport or other Government conveyance, is entitled to 57.142 per cent of 5 cents per mile (equal to 2.857 cents per mile). (Comp. Dec., Aug. 20, 1902, published in Cir. 45, A. G. O., 1902.)]

4. Civilians in Government employ.—Civilians in the employ of the Government when traveling upon summons as witnesses before military courts are entitled to transportation in kind from their place of residence to the place where the court is in session and return. If no transportation be furnished, they are entitled to reimbursement of the cost of travel actually performed by the shortest usually traveled route, including transfers to and from railway stations at rates not

exceeding 50 cents for each transfer, and the cost of sleeping-car accommodations to which entitled or steamer berth when an extra charge is made therefor. They are also entitled to reimbursement of the actual cost of meals and rooms at a rate *not exceeding* $3 per day for each day actually and unavoidably consumed in travel or in attendance upon the court under the order or summons. No allowance will be made to them when attendance upon court does not require them to leave their stations. (M. C. M., par. 184.)

APPENDIX 20.

WARRANT OF ATTACHMENT.

UNITED STATES
vs.
——— ———.

The President of the United States to ——— ———, *greeting:*

WHEREAS ———, of ———, was on the ——— day of ———, 192—, at ———, duly subpœnaed to appear and attend at ———, on the ——— day of ———, 192—, at ——— o'clock — m., before a ——— court-martial duly appointed by paragraph —, Special Orders, No. —, dated Headquarters ———, ———, 192—, to testify on the part of the ——— in the above-entitled case; and whereas he has failed to appear and attend before said ——— court-martial to testify, as by said subpœna required, and whereas he is a necessary and material witness in behalf of the ——— in the above-entitled case:

NOW, THEREFORE, by virtue of the power vested in me, the undersigned, as trial judge advocate of[1] said ——— court-martial, by article 22 of Chapter II of an act entitled "An act to amend an act entitled 'An act for making further and more effectual provision for the national defense, and for other purposes,' approved June 3, 1916, and to establish military justice," approved June 4, 1920 (41 Stat. 787), you are hereby commanded and empowered to apprehend and attach the said ——— wherever he may be found within the United States, its Territories, or possessions, and forthwith bring him before the said ——— court-martial at ——— to testify as required by said subpœna.

——— ———,
Trial Judge Advocate of said ——— *Court-Martial.*[2]

Dated ——— ———,
———, 191—.

[1] If a summary court-martial, line out the words "trial judge advocate of."
[2] If a summary court-martial, line out and substitute the necessary words.

APPENDIX 21.

EXEMPTIONS FROM THE JURISDICTION OF SPECIAL AND SUMMARY COURTS-MARTIAL.

GENERAL ORDERS, No. 71.

WAR DEPARTMENT,
Washington, December 1, 1920.

By direction of the President, under authority of the thirteenth and fourteenth articles of war, Chapter II, section 1, act of Congress approved June 4, 1920, the following regulations exempting certain classes of persons from the jurisdiction of special and summary courts-martial, are published to the Army for the information and guidance of all concerned:

1. Effective February 4, 1921, the following classes of persons are excepted from the jurisdiction of special courts-martial: Officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, and cadets.

2. Effective February 4, 1921, the following classes of persons are excepted from the jurisdiction of summary courts-martial: Noncommissioned officers above the rank of corporal; that is, enlisted men of a grade higher than the "fifth grade," as defined by section I, General Orders, No. 36, War Department, 1920.

3. Noncommissioned officers sentenced to reduction will be reduced to the grade of private, and not to the grade of private, first class.

(250.4, A. G. O.)

By order of the Secretary of War:

PEYTON C. MARCH,
Major General, Chief of Staff.

Official:

P. C. HARRIS,
The Adjutant General.

APPENDIX 22.

FORM A.

HABEAS CORPUS BY UNITED STATES COURT (WHERE A WITNESS IS HELD UNDER A WARRANT OF ATTACHMENT).

RETURN TO WRIT.

In re ——— ——— (name of party held).

(*Writ of habeas corpus—Return of respondent.*)

To the ——— ——— (court or judge):

The respondent, Maj. ——— ———, United States Infantry, upon whom has been served a writ of habeas corpus for the production of ——— ———, respectfully makes return and states that he holds the said ——— ——— by authority of the United States, pursuant to a warrant of attachment issued under Chapter II, act of June 4, 1920, twenty-second Article of War, by a trial judge advocate of a lawfully convened general (*or* "special") court-martial (*or* "by a summary court-martial") and duly directed to him, the said respondent, for execution; that he is diligently and in good faith engaged in executing said warrant of attachment, and that he respectfully submits the same for the inspection of the court, together with the original subpœna and proof of service of the same, a copy[1] of the order appointing the court-martial, sworn to as such, before which the said ——— ——— has been subpœnaed to testify, a copy of the charges and specifications in the case, sworn to as such, in which said ——— ——— is a witness, a copy of the order referring the case to the court for trial, sworn to as such, and an affidavit of ——— ——— showing that said ——— ——— is a material witness in the case; that he has failed to appear and has offered no valid excuse for such failure.

In obedience, however, to the said writ of *habeas corpus* the respondent herewith produces before the court the body of the said ——— ———, and for the reasons set forth in this return prays this honorable court to dismiss the said writ.

———, ———,
Major, ——— *United States Infantry.*

Dated ———, ———,
——— ———, 192—.

[1] The copy of the order appointing the court and of the charges, and of the order referring the case for trial, will be sworn to by the trial judge advocate (or summary court-martial) before an officer authorized to administer oaths.

FORM B.

HABEAS CORPUS BY STATE COURT (WHERE WITNESS IS HELD UNDER A WARRANT OF ATTACHMENT).

RETURN TO WRIT.

(*Make return as in case of writ by a United States court, supra, Form A, except as to the last paragraph, for which substitute as follows:*)

And said respondent further makes return that he has not produced the body of the said ——— ———, because he holds him by authority of the United States as above set forth, and that this court (*or* "your honor," *as the case may be*) is without jurisdiction in the premises, and he respectfully refers to the decisions of the Supreme Court of the United States in Ableman *v.* Booth, 21 Howard, 506, and Tarble's case, 13 Wallace, 397, as authority for his action, and prays this court (*or* "your honor.") to dismiss the writ.

———— ————,
Major, ——— *United States Infantry.*

Dated ———, ———,
———— ————, 192—.

FORM C.

HABEAS CORPUS BY UNITED STATES COURT (WHERE PRISONER IS HELD FOR TRIAL OR UNDER SENTENCE).

RETURN TO WRIT.

In re ——— ——— (name of party held).

(*Writ of habeas corpus—Return of respondent.*)

To the ——— ——— (court or judge):

The respondent, Maj. ——— ———, United States Infantry, upon whom has been served a writ of *habeas corpus* for the production of ——— ———, respectfully makes return and states that he holds the said ——— ——— by authority of the United States as a soldier in the United States Army (*or* "as a general prisoner under sentence of general court-martial") under the following circumstances:

That the said ——— ——— was duly enlisted as a soldier in the service of the United States at ———, ———, on ——— ——, 192—, for a term of ——— years. (*If the offense is fraudulent enlistment, this recital should be omitted.*)

(*Here state the offense. If it is fraudulent enlistment by representing himself to be of the required age, it may be stated as follows:*)

That on the ——— day of ———, 192—, at ——— ———, the said ———, being under 18 years of age, did fraudulently enlist in the mili-

tary service of the United States for the term of ——— years, by falsely representing himself to be over 18 years of age, to wit, ——— years and ——— months; and has, since said enlistment, received pay and allowances (*or either*) thereunder.

(*If the offense be desertion, it may be stated substantially as follows:*)

That the said ——— ——— deserted said service at ———, ———, on ——— ———, 192—, and remained absent in desertion until he was apprehended at ———, ———, on ——— ———, 192—, by ——— ———, and was thereupon committed to the custody of the respondent as commanding officer of the post of ———.

The said ——— ——— has been placed in confinement (*or* "arrest," *as the case may be*), and formal charges have been preferred against him for said offense, a copy of which charges, and of the order under which said ——— ——— is held in confinement (*or* "arrest," *as the case may be*), duly certified and verified,[2] are hereto annexed; and that he will be brought to trial thereon as soon as practicable before a court-martial, to be convened by the commanding general of the ——— Department (*or* "convened by Special Orders, No. —, dated Headquarters ——— Department, 192—, a copy of which, duly certified and verified,[2] is herein annexed").

(*If the party held is a general prisoner, the following paragraph should be substituted for the preceding paragraph:*)

That the said ——— ——— was duly arraigned for said offense before a general court-martial, convened by Special Orders, No. ———, dated Headquarters ——— Department, 192—, was convicted thereof by said court, and was sentenced to be ———, which sentence was duly approved on the ——— day of ———, 192—, by the officer ordering the court (*or* "by the officer commanding said ——— Department for the time being") as required by the ——— article of war. A copy of the order promulgating said sentence, duly certified and verified,[2] is hereto attached.

---

[2] The copies of the charges and of the order under which the accused is held in arrest or confinement, will be certified by the adjutant and sworn to before an officer authorized to administer oaths for military administration, in the following form:

I hereby certify that the foregoing is a full and true copy of the original charges preferred against ——— ———, and of the original order for his arrest (*or* "confinement," *as the case may be*), and that the same are in the usual form of military charges, and that such charges and order conform to the rules regulating military procedure.

——— ———, *Adjutant.*

Sworn to and subscribed before me this ——— day of ———, 192—.

——— ———,
Trial Judge Advocate of Court-Martial
(*Or* "Summary Court-Martial").

The copy of the order convening the court or publishing the sentence will be certified and verified in a similar manner.

In obedience, however, to the said writ of *habeas corpus* the respondent herewith produces before the court the body of the said ——— ———, respectfully refers to the decisions cited in the annexed brief (*if the case does not involve a minor under the required age the words* "respectfully refers to the decisions cited in the annexed brief" *will be omitted*), and for the reasons set forth in this return prays this honorable court to dismiss the said writ.

——— ———,
Major, ——— *United States Infantry.*

Dated ———, ———,
——— ———, 192—.

FORM D.

HABEAS CORPUS BY STATE COURT (WHERE PRISONER IS HELD FOR TRIAL OR UNDER SENTENCE).

RETURN TO WRIT.

(*Make return as in case a writ by a United States court, except as to last paragraph, for which substitute the paragraph set out in Form B, Appendix 22.*)

INSTRUCTIONS AS TO RETURNS TO WRITS OF HABEAS CORPUS.

The following instructions in regard to returns under A. R. 998 and 999, in the cases of soldiers who have committed military offenses and are held for trial or punishment therefor, and of general prisoners, are for the information and guidance of all concerned:

1. The return under A. R. 999 will be made in accordance with Form C (Appendix 22), and *if the person whose release is sought has committed the offense of fraudulent enlistment by representing himself to be of the required age,* will refer, as in last paragraph of that form, to the brief of authorities which follows these instructions, and a copy of that brief will be annexed to the return. Should the court order the discharge of the party, the officer making the return, or counsel, should note an appeal pending instructions from the War Department, and he will report to The Adjutant General of the Army the action taken by the court and forward a copy of the opinion of the court as soon as it can be obtained.

2. The return under A. R. 998 will be made in accordance with Form D (Appendix 22), *but a copy of the brief of authorities is not intended to be attached to the returns to writs of habeas corpus issuing from a State court.*

BRIEF TO BE FILED WITH A RETURN TO A WRIT OF HABEAS CORPUS ISSUED BY A UNITED STATES COURT IN THE CASE OF A SOLDIER WHOSE DISCHARGE IS SOUGHT ON THE GROUND OF MINORITY.

The right to avoid the contract of enlistment of a soldier on the ground of minority will be considered under the following heads: I. Under the common law; II. Under the statutes; III. Where the minor is held for punishment.

I.

UNDER THE COMMON LAW.

The enlistment of a minor is not avoidable by the minor nor by his parent or guardian at common law, but is only avoidable where the right to avoid it is conferred by statute.

This proposition is clearly established by the decision of the Supreme Court (*In re Morrissey*, 137 U. S., 157, 159), where the court said:

> An enlistment is not a contract only, but effects a change of status. (*Grimley's case*, 137 U. S., 147.) It is not, therefore, like an ordinary contract, voidable by the infant. At common law an enlistment was not voidable either by the infant or by his parents or guardians.

The court cites, in support of these statements, *Rex* v. *Rotherfield Greys* (1 Barn. & Cress., 345, 350; 8 Eng. C. L., 149); *Rex* v. *Lytchet Matraverse* (7 Barn. & Cress., 226, 231; 14 Eng. C. L., 107; *Commonwealth* v. *Gamble* (11 Serg. & Rawle (Pa. R), 93); *U. S.* v. *Blakeney* (3 Grattan, 387, 405.)

In *Rex* v. *Rotherfield Greys*, *supra*, it was said by Best, J.:

> By the general policy of the law of England the parental authority continues until the child attains the age of twenty-one years; but the same policy also requires that a minor shall be at liberty to contract an engagement to serve the State. When such an engagement is contracted it becomes inconsistent with the duty which he owes to the public that the parental authority should continue. The parental authority, however, is suspended, but not destroyed. When the reason for its suspension ceases the parental authority returns.

In *Rex* v. *Lytchet Matraverse*, *supra*, Bayley, J., after quoting these views of Best, J., says:

> Lawrence, J., in *Rex* v. *Roach* (6 T. R., 254), seems to take the same view of the subject and to consider the authority of the State paramount to that of the parent so long as the minor continues in the public service, but as soon as he leaves it then the parental authority is restored.

It is clear from these authorities and others which could be cited that at common law the enlistment of a minor *of sufficient capacity to bear arms* was valid regardless of age. The right of the State to the services of such minors is forcefully laid down in *Lanahan* v. *Birge* (30 Conn., 438). See also *Cooley's Constitutional Law*, page 99, where

on the authority of *Ex parte Brown* (5 Cranch, C. C., 554; Fed. Cas., No. 1972), and *United States* v. *Bainbridge* (1 Mason, 71; Fed. Cas., No. 14497), it is said:

> Minors may be enlisted without the consent of their parents or guardians *when the law fails to require such consent.*

II.

UNDER THE STATUTES.

The pertinent statutes are the following:

> SEC. 1116, R. S. Recruits enlisting in the Army must be effective and able-bodied men, and between the ages of sixteen and thirty-five years at the time of their enlistment. This limitation as to age shall not apply to soldiers reenlisted.

This section was modified by the act of March 2, 1899 (30 Stat., 978), which provides:

> That the limits of age for original enlistments in the Army shall be eighteen and thirty-five years:

and again modified by section 7 of the selective draft act of May 18, 1917 (40 Stat., 76, 81), and by Chapter XIII of the Army appropriation act of July 9, 1918, providing:

> That the qualifications and conditions for voluntary enlistment as herein provided shall be the same as those prescribed by existing law, for enlistments in the Regular Army, except that recruits for service in the staff corps and departments may be accepted who are between the ages of forty-one and fifty-five years, both inclusive, at the time of their enlistment, and that all other recruits must be between the ages of eighteen and forty years, both inclusive, at the time of their enlistment.
>
> SEC. 1117, R. S. No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: *Provided,* That such minor has such parents or guardians entitled to his custody and control.

This section is replaced by the provision of section 27, national defense act of June 3, 1916 (39 Stat., 186), which reenacts it in the same words, substituting the age of 18 years for the age of 21.

> SEC. 1118, R. S. No minor under the age of sixteen years, no insane or intoxicated person, no deserter from the military service of the United States, and no person who has been convicted of a felony shall be enlisted or mustered into the military service.

This proviso was not changed by the Army reorganization act of June 4, 1920, which struck out of section 27 of the national defense act (see 41 Stat. 775) only the first part of the section, up to and including the third proviso, but did not affect the proviso (fifth proviso) here in question.

1. *The statutes confer no right upon the minor to avoid his enlistment, certainly not if he be 16 years of age or over. No case has been found directly in point holding that a minor under 16 years of age, if of sufficient capacity to bear arms, may avoid his enlistment.*

Section 1116, R. S., as amended, prescribing the age limits of original enlistment, was made for the benefit of the Government, and not the minor. (*In re Morrissey*, 137 U. S., 157; *In re Grimley*, 137 U. S., 147; *In re Wall*, 8 Fed. Rep., 85; *In re Davison*, 21 Fed. Rep., 618; *In re Zimmerman*, 30 Fed. Rep., 176; *In re Spencer*, 40 Fed. Rep., 149; *In re Lawler*, 40 Fed. Rep., 233; *Solomon* v. *Davenport*, 87 Fed. Rep., 318; *Wagner* v. *Gibbon*, 24 Fed. Rep., 135.)

Section 1117, R. S., as amended, while recognizing the right of the parent to the services of the minor, confers no right in the minor to avoid his enlistment. See the cases cited above.

In the *Morrissey case* the Supreme Court of the United States said that the provision of section 1116, R. S.,

> is for the benefit of the parent or guardian * * * but it gives no privilege to the minor * * * an enlistment is not a contract only, but effects a change of status. It is not, therefore, like an ordinary contract, voidable by the infant * * *. The contract of enlistment was good, so far as the petitioner is concerned. He was not only *de facto* but *de jure* a soldier—amenable to military jurisdiction.

Whether the designation of the age limit of 16 years in section 1118, R. S., is such as to make the enlistment of the minor under 16 years of age void or voidable by the minor has not been decided. On principle, the minor, if of sufficient capacity to render military service, should not be permitted to avoid his enlistment obtained through his fraudulent statements as to his age. However this may be, if the minor continued to serve and receive pay after passing that age he—

> acquires the status of a soldier like one who was enlisted when over 16 years without the consent of his parents, and a court-martial has jurisdiction to try and sentence him to punishment for desertion, from which sentence he can not be discharged on habeas corpus on petition of himself or his parents. (*Ex parte Hubbard*, 182 Fed. Rep., 76.)

2. *The statutes requiring the consent of the parent or guardian of a minor to his enlistment (section 1117, R. S., amended by section 27, act of June 3, 1916) impliedly confer upon the parent or guardian the right to avoid an enlistment entered into by a minor under the prescribed age without the required consent, where the minor is not held for trial or punishment for a military offense.*

In support of this proposition see the cases cited under II, proposition 1.

3. *A parent or guardian with knowledge of the enlistment of a minor under the prescribed age and acquiescing therein for a considerable period, may be held to be estopped from asserting the right to avoid the enlistment.*

In support of this proposition see *Ex parte Dunakin* (202 Fed. Rep., 290), where it was held, quoting from the syllabi:

> Where a minor enlisted without the consent of his parent or guardian, and his mother, who was his surviving parent, on

learning of his enlistment shortly thereafter, did nothing to repudiate the same or to secure his release, and testified that she would have been reconciled to it had he remained in the Army and not deserted, but that after his desertion she wanted to keep him out of the Army, her acts constituted an implied consent to his enlistment.

4. *A minor fraudulently enlisting and remaining in the service after attaining the legal age of enlistment, or the age beyond which parental consent is not required, thereby validates his enlistment.*

In support of this proposition see the case of *Ex parte Hubbard* (182 Fed. Rep., 76), where the court held, quoting the syllabus:

A minor enlisted in the Army when under the age of 16, who has continued to serve and receive pay after passing that age, acquires the status of a soldier like one who was enlisted when over 16 without the consent of his parents, and a court-martial has jurisdiction to try and sentence him to punishment for desertion, from which sentence he can not be discharged on habeas corpus on petition of himself or his parents.

III.

WHERE THE MINOR IS HELD FOR PUNISHMENT.

Neither the minor nor his parent nor guardian may avoid the enlistment where the soldier is held for trial or under sentence for a military offense.

In support of this proposition see the cases cited above under II, proposition 1, and also the following: *In re Kaufman* (41 Fed. Rep., 876); *In re Dohrendorf* (40 Fed. Rep., 148); *In re Cosenow* (37 Fed. Rep., 668); *In re Dowd* (90 Fed. Rep., 718); *In re Miller* (114 Fed. Rep., 838); *United States* v. *Reaves*, (126 Fed. Rep., 127); *In re Lessard* (134 Fed. Rep., 305); *Ex parte Anderson* (16 Iowa, 595); *McConologue's case* (107 Mass., 154, 170); *In re Carver* (142 Fed. Rep., 623); *In re Scott* (144 Fed. Rep., 79); *Dillingham* v. *Booker* (163 Fed. Rep., 696); *Ex parte Rock* (171 Fed. Rep., 240); *Ex parte Hubbard* (182 Fed. Rep., 76); *Ex parte Lewkowitz* (163 Fed. Rep., 646); *United States* v. *Williford* (220 Fed. Rep., 291).

The reasons given for these decisions are that the enlistment of a minor in the Army without the consent of his parent or guardian required by section 1117, R. S., "is not void, but voidable only"; that the soldier being not only *de facto* but *de jure* a soldier, he is subject to the Articles of War and may commit a military offense; and that if held for trial or punishment for a military offense, the interests of the public in the administration of justice are paramount to the right of the parent or guardian, and require that the soldier abide the consequences of his offense before the question of his discharge will be considered by the court. In the *Miller case* (114 Fed. Rep., 842), the court supported its holding by the analogy of a minor held for punishment for a civil offense, saying:

> The common law, unaided by statute, fully recognizes the parents' right to the custody and services of their minor child; but it has never been held that they could, by the writ of habeas corpus or otherwise, obtain his custody and his immunity when he was held by an officer of a civil court of competent jurisdiction to answer a charge of crime. His enlistment having made the prisoner a soldier notwithstanding his minority, he is amenable to the *military law just as the citizen who is a minor is amenable to the civil law. The parents can not prevent the law's enforcement in either case* * * *.

The views here cited were approved in the *Reaves case* (126 Fed. Rep., 127), where upon full consideration of the authorities the Circuit Court of Appeals remanded Reaves, a minor, who had deserted from the Navy, to custody of the naval authorities as represented by the chief of police who had apprehended him. In the *Carver case* (142 Fed. Rep., 623), the syllabus is as follows:

> A minor under the age of 18 years who unlawfully enlisted in the Army without the consent of his father can not be discharged from the service on a writ of habeas corpus sued out by his father so long as he is under arrest for desertion nor until he has been discharged from such custody or has served the sentence imposed on him by the military tribunal.

In the *Lewkowitz case* (163 Fed. Rep., 646), the syllabus reads:

> A minor who by misrepresenting his age has fraudulently enlisted in the Army without the consent of his parents and thereby subjected himself to punishment under military law will not be relieved from such punishment by the civil courts by discharging him on a writ of habeas corpus on the application of his parents, *even though the military prosecution is not instituted until after the writ was issued.*

This was followed by the unanimous opinion in the Circuit Court of Apeals in the *Love case* (United States *v.* Williford, 220 Fed. Rep., 291), in which the court expressly approved the view stated in the *Lewkowitz case*, quoting section 761, R. S., relating to procedure under writs of habeas corpus, which reads as follows:

> The court, or justice, or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments and thereupon to dispose of the party as law and justice require.

The court added:

> Law and justice do not, in our opinion, require Love to be withdrawn from the military authorities and relieved of liability for his offense in favor of his mother's right to his custody.

By act of July 27, 1892 (27 Stat., 278), "fraudulent enlistment and the receipt of pay or allowance thereunder" was made a military offense, punishable under the sixty-second article of war. The offense is now defined in article 54, revised Articles of War, approved June 4, 1920 (41 Stat., 800), which provides that the offense "shall be punished as a court-martial may direct." A minor who procures his

enlistment by willful misrepresentation or concealment as to his qualifications for enlistment commits this offense, and the statute authorizes his punishment therefor. In general, it may be stated that where a minor has committed a military offense the interests of the public in the administration of justice are paramount to the right of the parent and require that the soldier shall abide the consequences of his offense before the right to his discharge be passed upon. The soldier should not be allowed to escape punishment for his offense, even though his parents assert their right to his services. A minor in civil life is liable to punishment for a crime or misdemeanor, even though his confinement may interfere with the rights of his parents; and the above authorities clearly apply the same rule to a minor held for trial or punishment for a military offense.

APPENDIX 23.

[Sheet 1.]

WAR DEPARTMENT, Form No. 338.

WAR DEPARTMENT.

PUBLIC VOUCHER.

COMPENSATION, CIVILIAN WITNESS.

Appropriation: Pay, etc., of the Army, 192

THE UNITED STATES TO ....., DR.

Address: .....

Voucher No. .....

Name, Designation, and Station of Disbursing Officer.

Object Symbol.		Amount.		U. S. notations.
	For mileage as a witness from ..... to .....and return, being ..... miles, at ..... cents per mile..	.....	.....	
	For allowance as a witness while in attendance—			
	On a court-martial at.....	.....	.....	
	Giving deposition at ..... for use before a court-martial from ....., 191 , to ....., 191 , as per certificate hereon, ... days, at $.... per day....	.....	.....	
	TOTAL.....	.....	.....	

I CERTIFY that, as stated above, I attended as a witness for the period named, and as such the travel between the places named was required.

(PAYEE) .....
(Do not sign in duplicate.)

EXAMINED BY

(Account to be completely filled in before certification, and no alteration or erasure to be made thereafter.)

I CERTIFY that ....., a civilian not in Government employ, has been in attendance from ....., 191 , to ....., 191 , inclusive, { as a material witness before a ..... court-martial duly convened at this place, giving deposition for use of a court-martial convened under attached orders, } and that he was duly summoned thereto from....., and was

not furnished transportation by the Government for any portion of the journey.

PLACE, ...

DATE, ..., 191 .....
(Title.)

Paid by check No. ....., dated ....., 191 , of ..... on ....., in favor of payee named above for $.....

OR

Received ....., 191 , of ....., IN CASH, the sum of ..... dollars and ..... cents, in full payment of the above account.

.....

$.....

.....

(This form to be used only for payment of civilian witnesses not in Government employ.)

[Sheet 2.]

WAR DEPARTMENT.
Form No. 338.

WAR DEPARTMENT.

PUBLIC VOUCHER.

COMPENSATION, CIVILIAN WITNESS.

Appropriation: Pay, etc., of the Army, 192 .

THE UNITED STATES, To ....., DR.

Address: .....

Voucher No. .....
Name, Designation, and Station of Disbursing Officer.

Object symbol.		Amount.		U. S. notations.
	For mileage as a witness from..... to .....and return, being ..... miles, at ..... cents per mile....	.....	....	
	For allowance as a witness while in attendance—			
	On a court-martial at	.....	....	
	Giving deposition at....for use before a court-martial from ....., 191 , to ....., 191 , as per certificate hereon, ... days, at $..... per day..	.....	....	
	TOTAL.....			
				EXAMINED BY

MEMORANDUM VOUCHER.
(To be filled in and retained by paying officer.)

Voucher certified by .....

Voucher approved by .....

Paid by check No. ....., dated ....., 191 , of .....

on ....., in favor of payee named above for $.....

OR

Paid in cash ..... by .....dollars and ..... cents
(Date.)

Funds derived from check No. ..... on .....

.....

$.....

.....

(This form to be used only for payment of civilian witnesses not in Government employ.)

APPENDIX 24.

[Sheet 1.]

WAR DEPARTMENT.
Form No. 350.
Approved by Comptroller of Treasury July 25, 1919.

WAR DEPARTMENT.

PUBLIC VOUCHER.

REIMBURSEMENT OF TRAVEL EXPENSES.

Voucher No. .....

Name, Designation, and Station of Disbursing Officer.

Appropriation: ..... *Item No.* .... $....
Appropriation: ..... *Item No.* .... $....
Appropriation: ..... *Item No.* .... $....

THE UNITED STATES To ....., DR.

Address: .....

	DIFFERENCES.	
FOR REIMBURSEMENT OF TRAVEL EXPENSES incurred in the discharge of official duty from ....., 19.., to ....., 19.., under written authorization from the ....., dated ....., 19.., a copy of which is ..... as per itemized statement on reverse hereof.....	.....	....
AMOUNT CLAIMED, $		

EXAMINED BY

.....

I DO SOLEMNLY *..... that the above account and statement on reverse hereof are true and correct; that the distances as charged have been actually and necessarily traveled by me on the dates therein specified; that the amounts as charged have been actually paid by me for travel expenses; that no part of the account has been paid by the United States, and the full amount is due; that all expenditures included in said account other than my own personal travel expenses were made under urgent and unforeseen public necessity, and that it was not, for the reasons stated herein, feasible to have such expenditures paid directly by a disbursing officer.

(PAYEE) .....
(Do not sign in duplicate.)

.....

Subscribed and † ..... to before me at ....., this ..... day of ....., A. D. 19..

.....

.....

*Swear or affirm. †Sworn to or affirmed.

I CERTIFY that the person rendering this account was traveling on public business under proper authority, for the period covered by this account; that I believe the expenses were necessarily incurred and paid as stated; and that I have examined the account which is hereby approved for $.....

.....

.....
(Title.)

Paid by check No. ....., dated ....., 19.., for $.....

OR

Received ....., 19.., of ..... in CASH, the sum
(Date.)

of ..... dollars and ..... cents, in full payment of the above account.

.....
(Do not sign in duplicate.)

[Reverse side of sheet 1.]

Date, 19....	Statement of expenditures.	Sub-voucher No.	Amount.	Differences
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
		TOTAL, $		

MEMORANDUM OF TRAVEL PERFORMED UPON TRANSPORTATION REQUESTS.

Date of travel.	No. of transportation request.	From—	To—	Via R. R.	Amount.	Differences.
.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....

[Sheet 2.]

WAR DEPARTMENT
Form No. 350
Approved by Comptroller of Treasury July 25, 1919.

WAR DEPARTMENT.

PUBLIC VOUCHER.

REIMBURSEMENT OF TRAVEL EXPENSES.

Voucher No. .....

NAME, DESIGNATION, AND STATION OF DISBURSING OFFICER.

Appropriation: ..... *Item No.* .... $....
Appropriation: ..... *Item No.* .... $....
Appropriation: ..... *Item No.* .... $....

THE UNITED STATES TO....., DR.

Address: .....

	DIFFERENCES.
For reimbursement of travel expenses incurred in the discharge of official duty from ....., 19.., to ....., 19.., under written authorization from the ....., dated ....., 19.., a copy of which is ..... as per itemized statement on reverse hereof.....	
TOTAL, $	

MEMORANDUM VOUCHER.

(To be filled in and retained by paying officer.)

EXAMINED BY—

.....

Voucher certified by .....

Voucher approved by .....

Paid by check No. ....., dated ....., 19.., for $.....

OR

Paid in cash ..... by ....., ...
(Date)
dollars and ..... cents.

(Reverse side of Sheet 2.)

Date, 19....	Statement of expenditures.	Sub-voucher No.	Amount.	Differences.
		TOTAL, $		

MEMORANDUM OF TRAVEL PERFORMED UPON TRANSPORTATION REQUESTS.

Date of travel.	No. of transportation request.	From—	To—	Via R. R.	Amount.	Differences.

APPENDIX 25.

[Sheet 1.]

WAR DEPARTMENT
Form 335.
Approved by Comptroller of Treasury
July 25, 1919.

WAR DEPARTMENT.

PUBLIC VOUCHER.

PERSONAL SERVICES.

Appropriation:..... *Item No*..... $....
Appropriation:..... *Item No*..... $....
THE UNITED STATES TO....., DR.
Address: .....

Voucher No.....
Stamp here
Name, Designation, and Station of Disbursing Officer.

Date. From—	Date. To—	Character of services.	Number of days.	Rate.	Amount.	
		For.....	.....	.....	.....	....
		Under authority of.....	.....	.....	.....	....
		Dated....., 19.....	.....	.....	.....	....
		Per attached certified statement, Form 335a, which is hereby made a part of this voucher whenever used.	.....	.....	.....	....
		Less deduction for.....	.....	.....	.....	....
		NET AMOUNT OF THIS VOUCHER.....	.....		.....	....

I CERTIFY that the above bill is true and correct, and that payment thereof has not been received, or (that I am not related to the patient named on certificate).

(Do not sign in duplicate.).....

EXAMINED BY .....

I CERTIFY that ..... was employed by me as a reporter for a ....., under the attached authority, and that the account for his services as stated is correct.

.....

.....

(Official title.)

APPROVED for $.....

.....

.....

.....

.....

(Title.)

Date....., 19....

Other certificates not applicable to reporter are omitted.

Paid by check No....., dated....., 19.., for $.....

OR

Received....., 19.., of....., in CASH, the sum of ..... dollars and ..... cents, in full payment of the above account.

.....

(Do not sign in duplicate.)

$.....

.....

WAR DEPARTMENT. (Sheet 2.)
Form 335.
Approved by Comptroller of Treasury
July 25, 1919

WAR DEPARTMENT,

PUBLIC VOUCHER.

PERSONAL SERVICES.

Appropriation: ..... *Item No.* .... $....
Appropriation: ..... *Item No.* .... $....

THE UNITED STATES To....., DR.
Address: .....

Voucher No.....

Stamp here

Name, Designation, and Station of Disbursing Officer.

Date. From—	Date. To—	Character of services.	Number of days.	Rate.	Amount.	
		For.....				...
		Under authority of.....				...
		Dated ....., 19....				...
		Per attached certified statement, Form 335a, which is hereby made a part of this voucher whenever used.				...
		Less deduction for.....				...
		NET AMOUNT OF THIS VOUCHER....				...

MEMORANDUM VOUCHER.

(To be filled in and retained by paying officer.)

EXAMINED BY .....

Voucher certified by.....

Voucher approved by.....

Paid by check No. ....., dated ....., 19...., for $.....

WAR DEPARTMENT,
Form 335-A.
Approved by Comptroller of Treasury
July 25, 1919.

Voucher No.....
To be attached to Form 335.

WAR DEPARTMENT.

STATEMENT OF PERSONAL SERVICES.

RENDERED AS SHOWN IN DETAIL BELOW.

THE UNITED STATES To ....., DR.

(1) Date. From— 19—	(1) Date. To— 19—	(2) Character of services rendered.	(3) To whom rendered. Disease or disability.	(4) Rate.	(5) Amount.	

(*This statement must be completely made out by payee before certification and attached to voucher. There must be no alteration or erasure.*)

I CERTIFY that the above statement is true and correct, and that the amounts are the customary charges and not excessive.

.....

.....

See reverse side for information.

INSTRUCTIONS FOR PREPARING STATEMENT ON FORM 335-A.

This statement must be made in duplicate, showing in detail—

Column 1.—Inclusive dates of services.

Column 2.—To whom the services were rendered, giving rank, company, regiment, or organization, where necessary.

Column 3.—Character of services. If for medical attendance of any kind, or nursing, state necessity for such services, also kind of disease or disability; if for clerical, technical, or professional services, state classification; if for court reporting, give number of hours or number of words in hundreds.

Column 4.—Rate of pay for services when on per diem basis; per hour or per hundred words if for official reporter.

Column 5.—Total amount of compensation.

If this voucher is for payment of reward for apprehension and delivery of deserter or escaped military prisoner, so state in column 2, and give full name of deserter or escaped prisoner, also company, regiment, or organization in column 3.

APPENDIX 26.

REPORT OF INQUEST.

———— ————,
————, 192—.

From: ———— ———— summary court-martial.
To: Commanding officer.
Subject: Report of inquest over body of ————, deceased.

1. Pursuant to your letter (*or*, your oral instructions) of ————, I viewed on the ———— day of ————, the body of ————, found dead at this post, and have examined the following witnesses, whose testimony is appended to this report:

————— —————.

————— —————.

2. From a view of the body and from the evidence before me I find that at or about ———— m., on the ———— day of ———— (*or*, on or about the ———— day of ————), ————, a ———— of ————, ———— Regiment of ———— (*or*, a civilian), died a natural death (*or*, committed suicide; *or*, was accidentally killed in manner and circumstances as follows; *or*, was killed by ———— or by some person or persons unknown, in manner and circumstances as follows: (*or* otherwise, as the case may be).

———— ————.
———— ————.

APPENDIX 27.

IRREGULARITIES AND ERRORS IN COURT-MARTIAL TRIALS.

The following list of irregularities and errors in records of proceedings before courts-martial is not intended to be complete or exhaustive. It is appended for the purpose of pointing out those irregularities and errors that have been most common, and of specifically warning against them. Most of the irregularities and errors contained in this list result from carelessness or oversight. No attempt has been made to classify them. Some of them are not serious; but they should not occur.

1. The record is not accompanied by the order referring the case to the court for trial.
2. The record shows that the accused was tried by a different court from that to which the case was referred by the convening authority.
3. No report of investigation of the charges accompanies the record.
4. Charge sheet missing.
5. Allotments not entered on charge sheet.
6. Record not briefed on back as required by Appendix 10, M. C. M.
7. Index incomplete or not in proper form.
8. Army serial number of accused omitted.
9. Variance between Army serial number of accused as shown in the charge sheet and as shown in the record of trial.
10. Variance in initials or names of members of the court, the trial judge advocate, assistant trial judge advocate, defense counsel, assistant defense counsel, or witnesses, in different parts of the record.
11. The record shows that an officer who had officially recommended that the accused be tried by court-martial sat as a member of the court by which the accused was tried.
12. The record shows that an officer who subscribed the charges sat as a member of the court by which the accused was tried.
13. The record shows that a member of the court who testified as a witness for the prosecution continued to sit as a member of the court.
14. Variance in rank of members of the court shown in different parts of the record, without any copy of, or reference to, any order showing changes in rank.
15. The record does not show that the accused was informed of his right to demand a copy of the record of his trial, or that he was asked whether or not he desired a copy thereof.
16. No receipt of the accused for a copy of the record of trial, or affidavit of delivery of it to him, is appended to the record.

17. The record does not show that a member of the court who was challenged withdrew when the vote on the challenge was taken by the court.

18. The record does not show that the order appointing the court and each amendatory order was read to the accused.

19. The record does not affirmatively show that the accused was afforded the right to challenge each member of the court (including his right to one peremptory challenge).

20. The record shows that an officer sat as a member of the court without apparent authority, i. e., the record contains no order detailing him as such.

21. The record does not show that all members of the court, the trial judge advocate, the assistant trial judge advocate, the reporter, and the interpreter were sworn.

22. Offenses charged under wrong Articles of War.

23. One or more specifications constitute unnecessary duplication of charges.

24. The name of the person signing the charges is not shown by the record.

25. The oath to the charges is not copied into the record.

26. The grade and organization of the person signing the charges are not shown by the record.

27. The words "officer preferring charge," or "by order of" a commanding officer, or other unnecessary or prohibited words, are used in connection with the signature of the person signing the charges.

28. The record does not show that the accused entered a separate plea to each charge and specification.

29. The pleas of the accused are irregular in form, e. g., "not guilty of desertion, but guilty of absence without leave."

30. The record does not show that the accused was properly or sufficiently instructed in regard to the effect of a plea of guilty and the maximum penalty for the offenses charged.

31. In a proper case, i. e., one in which the accused makes a statement inconsistent with his plea of guilty, or qualifies his plea of guilty, the record does not show that the court ordered the accused's plea of guilty changed to a plea of not guilty.

32. The record does not show that the paragraphs of the Manual for Courts-Martial that set out the gist of the offense or offenses charged against the accused were read to the court by the trial judge advocate; or does not specifically show which paragraphs or parts of paragraphs were read; or shows that the wrong paragraphs were read.

33. The record fails to show that each witness was sworn.

34. The record does not show that, before testifying, each witness for the prosecution was required by the trial judge advocate to identify the accused, as required by paragraph 250, M. C. M.

35. The record fails to show that the accused is a person subject to military law.

36. The record shows that a witness was recalled and permitted to testify without being reminded that he was still under oath.

37. Clearly improper evidence admitted by the court, e. g., the admission of a confession without proper foundation, or the admission of a deposition in a capital case.

38. The record does not show that the court ruled on an objection to evidence.

39. The record fails to show that the law member (or the president of the court) explained to the accused his rights as a witness; or that he did so properly.

40. The record does not show that the prosecution rested.

41. The record shows that the trial judge advocate made use of improper argument, e. g., that he commented upon the failure of the accused to testify in his own behalf.

42. The record does not show that the court made any findings upon one or more of the charges or specifications.

43. The findings of the court are not in proper form, e. g., "not guilty of desertion, but guilty of absence without leave."

44. The record shows that evidence concerning previous convictions of the accused was read to the court before the court's findings were made.

45. Although the trial judge advocate was present at the trial, the record is authenticated by the assistant trial judge advocate, and contains no statement that the trial judge advocate could not authenticate the record on account of his death, disability, or absence.

46. Interlineations or corrections in the record are not initialed by the trial judge advocate or by the person by whom they were made.

47. Exhibits missing from record.

48. A specification is incomplete or legally insufficient because of the omission of some necessary allegation, e. g., the allegation that the act described was committed unlawfully or feloniously, or because it does not allege every essential element of the offense sought to be charged.

49. The record fails to show that the accused had (1) no evidence (*or no further evidence*) to offer, or (2) no statement (*or further statement*) to make, or (3) no argument (*or further argument*) to offer.

NOTE.—This appendix should be included in the courses of instruction in the Manual for Courts-Martial at officers' schools.

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[References are to paragraphs, except that the letter "p" indicates page, "A. W." indicates Articles of War, and "App." indicates Appendix.]

It being impossible to index every paragraph in every possible logical place, the Index aims to be as specific as possible. Consult, therefore, the more specific heads—e. g., for Depositions, look under "Depositions," and not under "Evidence."

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